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Performance, Property, and the Slashing of Gender in Fan Fiction

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PERFORMANCE, PROPERTY, AND THE SLASHING OF GENDER IN FAN FICTION

SONIA K. KATYAL*

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INTRODUCTION

Today, it is no secret that the regime of copyright law, once an often-overlooked footnote to our legal system of property, now occupies a central position in modern debates surrounding the relationship between freedom of expression, language, and

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ownership. Curiously, while contemporary scholarship on copyright now embraces a wide range of political and economic approaches, it has often failed to consider how intellectual property, as it is owned, constituted, created, and enforced, both benefits and disadvantages segments of the population in divergent ways. This absence is both vexing and fascinating. While issues of distributive justice have permeated almost every other area of legal scholarship, the literature on intellectual property, while perfectly poised to grapple with these aspects, has traditionally reflected a striking lack of attention to these considerations.² This tendency becomes even more noticeable as we see a growing number of debates that continue to permeate the architecture of intellectual property, providing a silent subtext that forces us to confront which narratives receive protective license and which narratives receive legal prohibition.

At the same time, intellectual property law is uniquely poised to govern the most intimate aspects of the representations of human life, including the depiction and commodification of racial, sexual, ethnic, and political identities. Indeed, far from being a value-neutral regime, the history of intellectual property law reveals an astonishing number of incidences where the laws of copyright, trademark, and patent have been used—often with great success—to silence transgressive depictions of sexuality, sexual identity, and gender expression. Earlier in the history of intellectual property law, protection for patented inventions did not extend to so-called “immoral” innovations.³ Today, within the realm of trademark and copyright law, courts have routinely protected the rights of intellectual property owners to enjoin expressive uses of their works under the argument that sexualized depictions “tarnish” the

2. *But see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (criticizing both expansionist and minimalist views of copyright and setting forth a “democratic” framework that enhances both independent and pluralist aspects of society); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002) (concluding that copyright’s prohibition of unauthorized derivative works runs counter to the First Amendment and makes it unconstitutional); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000) (critiquing copyright law as too restrictive from a First Amendment standpoint); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005) (explaining how copyright disproportionately affects “poorly financed creators” and exploring reforms that would ease such burdens).

3. *See* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 142-44 (3d ed. 2003) (providing an abbreviated history of inventions that have been denied a patent for beneficial or moral utility); *Bedford v. Hunt*, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (No. 1217) (describing a useful invention as one without “obnoxious or mischievous tendency”); *Lowell v. Lewis*, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8568) (demonstrating how “immoral” inventions cannot satisfy patent law’s utility requirement).

wholesomeness of the original.⁴ More specifically, recent cases demonstrate an increasing interest in prohibiting suggestions of homosexuality in appropriated works.⁵ Consider the recent series of cease-and-desist letters sent by DC Comics to a New York art gallery and web site over a series of paintings that showed the superheroes "Batman and Robin" in homoerotic poses.⁶ Other examples involve a series of legal threats levied against the maker of a film, *Ernest and Bertram*, which depicted the two Sesame Street characters "Ernie and Bert" in a same-sex relationship,⁷ as well as against the makers of a

4. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (deciding that defendant's song "Cunnilingus Champion of Company C" was not fair use of "Boogie Woogie Bugle Boy of Company B," because the former was "neither a parody or burlesque" of the latter); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979) (holding that viewers of the movie *DEBBIE DOES DALLAS* would not be able to dissociate it from the Dallas Cowboys cheerleaders, causing confusion and harm to the cheerleader's reputation); *Hasbro, Inc. v. Internet Entm't Group, Ltd.*, No. C96-130WD, 1996 WL 84853, at *1 (W.D. Wash. Feb. 9, 1996) (deciding that defendant tarnished plaintiff's "Candy Land" mark by operating *candyland.com* as a pornographic web site); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975) (holding defendant's use of the "Mickey Mouse March" as audio background to pornographic scene not protected by fair use). But see *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 252 (2d Cir. 1980) (finding parodists' transformation of "I Love New York" into "I Love Sodom" noninfringing); *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 900-01 (N.D. Cal. 2002) (ruling that the creators of the *STAR WARS* films failed to establish that their trademark was tarnished by a pornographic parody); *Pillsbury Co. v. Milky Way Prods., Inc.*, Civil No. C78-679A, 1981 WL 1402, at *10 (N.D. Ga. Dec. 24, 1981) (holding that a picture in a magazine depicting characters resembling "Poppin' Fresh" and "Poppie Fresh" engaged in sexual acts was noninfringing because it was a fair use).

5. See *MGM-Pathe Commc'ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991) (granting a preliminary injunction to the owner of the trademark for the Pink Panther to prevent a gay rights group from using the same name); Michael Colton, *I'm Sorry, Tinky Winky*, SALON, Feb. 13, 1999, <http://www.salon.com/news/1999/02/13newsb.html> (describing Jerry Falwell's targeting of the television show *Teletubbies* for promoting homosexuality); *The Thirty Years War: A Timeline of the Anti-Gay Movement*, INTEL. REPORT (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2005, <http://www.splcenter.org/intel/intelreport.article.jsp?aid=523> (documenting the progression of various antigay organizations over the past thirty years); Press Release, Nat'l Ctr. for Lesbian Rights, Trademark Office Says No to Dykes on Bikes National Center for Lesbian Rights and Brooke Oliver Law Group Vow to Keep Fighting for Lesbian Visibility (July 14, 2005), http://www.nclrights.org/releases/pr-dykesonbikes_071405.htm (criticizing the United States Patent and Trademark Office's denial of a request to register the name "Dykes on Bikes" because they used an incorrect legal standard in judging the word *dyke* to be vulgar). This case was later overturned on appeal. See Christopher Curtis, Trademark Office OK's 'Dykes on Bikes,' at <http://www.planetout.com/news/article-print.html?2005/12/08/2> (last visited May 30, 2006).

6. See *Gallery Told to Drop 'Gay' Batman*, BBC NEWS, Aug. 19, 2005, <http://news.bbc.co.uk/1/hi/entertainment/arts/4167032.stm>.

7. See *Sesame Street Legal: Furore Over Bert and Ernie Gay Flick*, GUARDIAN UNLIMITED, Apr. 10, 2002, http://film.guardian.co.uk/News_Story/Exclusive/0,4029,681812,00.html [hereinafter *Sesame Street*] (reporting that in 1993, the makers of *Sesame Street* issued a statement which vociferously defended their heterosexuality: "Bert and Ernie, who've been on *Sesame Street* for 25 years, do not portray a gay couple, and there are no plans for them to do so in the future. They are

series of greeting cards that featured John Wayne and Clark Gable with gay themes.⁸ Mattel also protested a film's depiction of its sterling commodity Barbie engaging in a sexual relationship with a female servant.⁹ A variant of this issue even reached the Supreme Court in a case that held that the United States Olympic Committee (USOC) could enjoin the use of the term the "Gay Olympics" on similar grounds.¹⁰

As these events demonstrate, queering mainstream works, while endlessly entertaining, can also be construed as a brazen act of civil disobedience against the frameworks of intellectual property.¹¹ While depictions of sex and sexuality have always been fraught with cultural controversy, these incidents demonstrate how such incidences of "semiotic disobedience" increasingly personify an underlying tension between our legal regimes of intellectual property and free speech, revealing how issues of distributive justice are invisibly intertwined within the interstices of commodified representations.¹² While constitutional speech frameworks tend to treat expression as part of an ongoing contribution to layers of democratic dialogue, intellectual property frameworks tend to honor expression as an excludable, privately owned resource. Even though fair use defenses are meant to mediate the boundaries between property and speech, their inherent lack of predictability sometimes contributes to the ongoing instability within the field at large. Often, as these cases show, the resolution of these conflicts results in the exclusion of certain types of recoding over others.

In sum, there is much more to be said about the relationship

puppets, not humans").

8. See Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 931 (1999) [hereinafter Hughes, *Recoding*] (discussing the greeting cards cases); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 145-46 (1993) (describing that in both greeting card cases, the heirs of both celebrities found the associations with homosexuality objectionable).

9. See *Lesbian Barbie Film Blocked by Mattel*, 365 GAY.COM, Mar. 11, 2002, <http://www.planetout.com/news/article.html?2002/03/11/4> (describing how Mattel obtained a court order to prevent a film depicting Barbie as a lesbian from being displayed).

10. See *S.F. Arts and Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 530, 535, 541, 546 (1987) (holding that the USOC could control the use of the term "Olympics" as the statute granting such power did not require that the unauthorized use be confusing).

11. See generally Sonia K. Katyal, *Semiotic Disobedience*, WASH. U. L.Q. (forthcoming 2006) [hereinafter Katyal, *Semiotic Disobedience*] (using the term "semiotic disobedience" to illustrate situations where authors and artists choose to aggressively rework and recode particular texts, often in opposition to the author's intended meaning).

12. *Id.* (claiming that the tension between intellectual property and speech protections conceals a more basic conflict between democracy and disobedience).

between intellectual property—as a governing body of law—and its distributive implications for the particular identities that it governs. As these examples suggest, intellectual property law plays significant roles in regulating the marketplace of speech. Depending upon its vantage point, the law can either empower or disable creativity, while also having a powerful impact on who actually receives access to and protection within the marketplace of cultural products. Further, as these examples might suggest, propertizing expression benefits some authors and artists, often within the mainstream, sometimes at the cost of chilling other types of artistic expression and commentary, often from “outsider” groups like women, people of color, and sexual minorities.¹³ Ignoring this result matters. If we construe a marketplace of copyrighted cultural products as akin to, or at least reflective of, the rich diversity of the marketplace of ideas itself, then the denial of the privileges of authorship to some suggests that we are missing an important and illuminating facet of the relationships between production, representation, and consumption within copyright law. Consequently, we must consider how the inability to access these markets can yield a lasting impression, one that relates to and fosters a greater and more permanent exclusion from the marketplace of speech itself.

Consider, perhaps, one of the most glaring pieces of evidence in this respect. It is perhaps no secret to academics and lawyers that women are disproportionately underrepresented in governing the ownership, production, and management of copyrighted content in the United States. One recent study conducted by the Annenberg Center noted that among the top media companies in telecommunications, publishing, printing, entertainment, and advertising women were grossly underrepresented.¹⁴ The study noted that on average women make up no more than fifteen percent of top executives, even less of board directors, and that no company has a

13. See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1991) [hereinafter Coombe, *Objects of Property*] (noting that intellectual property laws are able to promote and restrict various expression due to the objectification of cultural forms).

14. See ERIKA FALK & ERIN GRIZARD, THE ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., THE GLASS CEILING PERSISTS: THE 3RD ANNUAL APPC REPORT ON WOMEN LEADERS IN COMMUNICATION COMPANIES 4 (2003), available at http://www.annenbergpublicpolicycenter.org/04_info_society/women_leadership/2003_04_the-glass-ceiling-persists_rpt.pdf (reporting the key findings of the study which uses the number of women in executive positions at the nation's largest communications companies as well as the human resources policies at these companies to assess the “glass ceiling”); see also Lisa M. Bowman, *Women Leaders? Not in our Boardroom*, CNETNEWS.COM, Aug. 27, 2002, http://news.com.com/Women+leaders+Not+in+our+boardroom/2100-1017_3-955528.html (noting that several companies had no women executives and others had no women board members).

majority of women in top executive positions or on its board.¹⁵ The absence of women from the top positions governing the management and production of intellectual property is not simply structural—one could credibly argue that it extricably affects every aspect of the content industries, particularly regarding the logic and strategy behind content production and the creation of intellectual property.

Yet, here, the nature of cyberspace as an entity can teach us a host of lessons regarding the relationship between gender, sexuality, and intellectual property that real space cannot. Years ago, when the Internet was first beginning to permeate our ways of thinking and communicating, legal scholars proclaimed that cyberspace was a new, borderless entity—capable, in the words of John Perry Barlow, of transcending human concepts of space, identity, property, time, and governance.¹⁶ While many of his utopian predictions have failed to sustain themselves in the wake of increasing surveillance and private and public control, the Internet has today unleashed an enormous array of opportunities for individuals to participate in the creation and circulation of content. That invitation has extended itself to individuals from *all* walks of life—male, female, straight, gay, and those that challenge the boundaries of identity in particular.

The freedom of cyberspace, I would argue, has particular significance for “outsider” groups, particularly women and minorities. For example, in stark contrast to the disproportionality that we see in real space with respect to gender equity, in cyberspace, we see an almost breathtaking array of equity in participation. Some studies claim that women have far outpaced men when it comes to using the Internet.¹⁷ One study reports that women make up half of all Internet users, even though the American population is forty-eight percent male.¹⁸ In making these observations, I certainly do not mean to underestimate the comparable impact of race, class, location,

15. *Id.*

16. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, in CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS 27, 27-30 (Peter Ludlow ed., 2001) (introducing a mock Declaration of Independence for cyberspace).

17. See Eric Chabrow, *More American Women than Men Go Online*, INFO. WEEK, Apr. 7, 2005, <http://www.informationweek.com/showArticle.jhtml?articleID=160502074>; *It's a Women's Web*, EMARKETER.COM, Apr. 7, 2005, <http://www.emarketer.com/Article.aspx?1003337>; *Nielsen NetRatings: More and More US Women Online*, NUA INTERNET SURVEYS, Jan. 21, 2002, http://www.nua.com/surveys/index.cgi?f=VS&art_id=905357576&rel=true; *Women Outnumber Men on the Web in U.S., Study Shows*, CNN.COM, Aug. 9, 2000, <http://archives.cnn.com/2000/TECH/computing/08/09/women.reut/>.

18. See AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, THE EVER-SHIFTING INTERNET POPULATION 6-7 (2003), available at http://www.pewtrusts.com/pdf/vf_pew_Internet_shifting_pop.pdf (presenting demographic data regarding users and non-users of the Internet broken down by gender, race, age, household income, educational attainment, and community type).

and education (among other factors) on access to technology.¹⁹ However, I do want to point out some of the powerful ways in which women's access to technology offers us a world of potential promise in terms of closing the gender gap in the production and management of intellectual property. In cyberspace, by creating spaces for the "outsider," we have enabled the creation of a world of informal markets and amateur communities that create cultural resources, illustrating how women's access to technology can radically change the future of the production of intellectual property. Further, the world of cyberspace also demonstrates the establishment of a world that transcends the strictures of everyday identities, particularly where gender and sexual identity are concerned.

In this Article, I specifically want to excavate the relationship between the formal and the informal marketplaces of copyrighted commodities and expression. My central argument is that the interactions between the two markets highlights a deeper set of constraints and possibilities with respect to equalizing the marketplace of speech, particularly regarding the production, dissemination, and circulation of content by women. Here, instead of serving as fixed, excludable elements of owned property as in real space, copyrighted cultural products in cyberspace become performative, cultural texts—infrastructural resources—that are ripe for commentary, recoding, transgression, and appropriation.²⁰

By creating spaces for reworkings of cultural texts, we allow them to transcend their fixed, stable form and instead to become properties that are performative in nature, ripe for audience participation and contribution. To show how this world is possible, I draw on performance theory to demonstrate the need for copyright's active reengagement with its "outsider" audience. While most conventional scholarship tends to think of the audience as a largely passive body of recipients, performance theory has helped us to radically rethink these assumptions and has offered scholars a host of insights regarding the multiple and intersecting ways in which audiences respond to performances, often creating rich and varied interpretations of a preexisting work, fan fiction being a single example. Along these lines, I argue that copyright must view its

19. See *id.* (reporting that white Internet users greatly outnumber African-American and Hispanic Internet users). Income, education, and age are also major predictors of Internet use with those having a higher income, higher education, and younger age more likely to go online. *Id.* at 8.

20. See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 1017-1018 (2005) (noting that users of the Internet are active participants who create a product through their interactions that is beneficial to society).

commodities not as fixed, stable texts, but rather as a set of starting points, a set of ongoing performances that can be recoded and reanalyzed by an active audience. In other words, I argue that copyright law needs to equalize the authorial monopoly of the creator in favor of a more dialogic and dynamic relationship between producers and consumers in the process.

In this Article, I specifically focus on one key example of the difference between property and performance by exploring a particular type of fan fiction known as "slash" fan fiction, which demonstrates how copyright both protects and prohibits divergent kinds of expression.²¹ Slash fan fiction is just one example of the myriad number of ways in which female audience participation can drastically alter the performance and interpretation of a given text.²² Women have long been the dominant force behind fan fiction; like many types of creative work performed by women, their contributions are usually circulated among informal, decentralized, and largely unrecognized communities outside of the mainstream.²³ Yet slash takes the trope of the engaged audience to a new level. Slash involves fictional, homoerotic pairings between male characters in mainstream television programs and films, usually science fiction.²⁴ As I show,

21. Fan fiction is commonly defined as amateur fiction set in scenarios that uses characters or personas created by others, usually in popular culture. See A Glossary of Fannish Terms, <http://www.agentwithstyle.com/glossary.htm> (last visited Jan. 21, 2006) [hereinafter Glossary]; see also Fanfiction Home Page, <http://www.fanfiction.net> (last visited Feb. 15, 2006) (providing a collection of fan fiction about characters from popular television, movies, books, games, and other media).

22. See, e.g., Lakshmi Chaudhry, *Hey Spock, Lookin' Good*, WIRED NEWS, Sept. 9, 2005, <http://www.wired.com/news/culture/0,1284,38484,00.html> (quoting Henry Jenkins, the leading authority on fan fiction, who argues that slash is "what women want male sexuality to look like").

23. See Camille Bacon-Smith, *Spock Among the Women*, N.Y. TIMES, Nov. 16, 1986, §7, at 1 (discussing how women, rather than men, are far more likely to engage in amateur production of content in science fiction venues); *Fanfic: Is it Right to Write?*, THE AGE, Jan. 5, 2004 available at <http://www.theage.com.au/articles/2004/01/02/1072908900255.html?from=storyrhs> (quoting slash author Ika Willis, who compares slash to other informal creative work by women, such as quilting); see also Nat Muller, *Interview with Constance Penley*, FRINGECORE, <http://www.fringecore.com/magazine/m3-4.html> (last visited July 26, 2006) (exploring the dynamics of female participation in Kirk/Spock slash); Noy Thrupkaew, *Fan/tastic Voyage: A Journey Into the Wild Wild World of Slash Fiction*, BITCH MAGAZINE, Spring 2003, http://www.bitchmagazine.com/archives/04_03slash/slash.shtml (last visited July 26, 2006) (analyzing the reasons female slash fan fiction authors choose to write about relationships between male characters).

24. See Anne Kustritz, *Slashing the Romance Narrative*, 26 J. AM. CULTURE 371, 372 (2003) (providing examples of slash fiction pairings such as Starsky/Hutch, Picard/Q from "Star Trek: The Next Generation," Blair Sandburg/Jim Ellison from "The Sentinel," Benton Fraser/Ray Vecchi and Benton Fraser/Ray Kowalski from "Due South," Kim/Paris from "Star Trek: Voyager," Skinner/Mulder and Krycek/Mulder from "The X-Files," Xena/Gabrielle from "Xena: Warrior Princess," Angel/Xander from "Buffy the Vampire Slayer," Obi-Wan Kenobi/Qui-Gon Jinn and Obi-Wan Kenobi/Darth Maul from *Star Wars: The Phantom Menace*; Josh

slash empowers the virtual community to actively rework traditional narratives between men, demonstrating how queering mainstream characters can actually deconstruct and then transcend traditional gender norms and stereotypes. Unlike the commodified world of the content industries that are largely dominated by men, slash represents a striking example of how female consumers can radically rework and recode existing texts. By doing so, they produce new works that add to the marketplace of ideas to create an alternative cultural and political economy that surrounds a copyrighted work, and, as I argue, actually “slash” the strictures of gender stereotyping in the process.

Although slash has been explored at length in the literature analyzing fandom, it has received almost no attention in the literature surrounding the relationship between technology, gender, and intellectual property.²⁵ Yet I would argue that slash offers just one example of how equal access to technology can yield richer and more complicated textual narratives than the content industries offer. Slash fan fiction demonstrates an increasing tendency towards product differentiation that creates two parallel markets in the production of content: one in real space that reflects some degree of gender inequity within the marketplace of products and another in cyberspace that reflects significant gender participation within the marketplace of expression. The former is a commodity-based market driven by profit; the other an idea-based market that is driven largely by the desire to “recode” and “rework” appropriations from the first.

In turn, while copyright law could play an extremely dynamic role in mediating these two markets, it often operates to silence, rather than advance, such oppositional recodings. Although some scholars, like Rebecca Tushnet, have argued that fan fiction falls within fair use exceptions, many copyright holders have vociferously disagreed and periodically institute random cease-and-desist campaigns against fan fiction sites, particularly ones that offer slash narratives.²⁶ But their legal campaigns often generate a host of online protests²⁷ and have so

Lyman/Sam Seaborn from “The West Wing,” and Clark Kent/Lex Luther from “Smallville,” to name just a few).

25. But see Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 373-74 (1992) [hereinafter Coombe, *Author/izing the Celebrity*] (examining how the law prohibits the reproduction of mass media images by denying rights to recreate and alter celebrity personas in such contexts as fanzines, but at the same time creates incentives to contest such fixed images).

26. See *infra* Part III (providing examples of copyright holders ordering slash fan fiction sites to take down their material).

27. See Sarah Kendzior, *Who Owns Fandom?*, SALON, Dec. 13, 2003, <http://archive.salon.com/tech/feature/2000/12/13/fandom/print.html> (describing the occasional legal skirmishes that have arisen between trademark and web domain owners and ardent fans).

far done little to stem the general growth of fan fiction in cyberspace. Indeed, I would argue that incidences of private enforcement only tend to divide, rather than chill, the marketplaces of speech. This results in the creation of two parallel political and cultural economies in copyrighted content: one honored by the protection of law and another privately ordered system that flourishes in the wake of continued tolerance through the use of disclaimers and other informal means of protection. Finally, rather than mediating these two parallel markets, as I show, copyright law actually perpetuates the division between them.

This Article is structured in three main parts. Part I introduces some basic theories of performance studies and seeks to illuminate what this area of study might yield with respect to fan fiction and gender. Part II details the phenomenon of slash fan fiction, its history and purpose, and demonstrates how female appropriation of popular culture can drastically alter and recode the marketplaces of copyrighted expression. Finally, Part III turns to the contours of law's governance and argues that the laws of intellectual property are structured to perpetuate, rather than disable, the current state of gender inequity in the content industries. Part III also advocates for a greater expansion of the law to protect a greater degree of audience participation. As I argue, slash fan fiction highlights a key intersection between intellectual property and gender that is often overlooked. If we are to build a world of gender equality in the production of media, then we must first ensure that the law of intellectual properties guarantee, rather than prohibit, a dynamic and rich degree of audience participation in the process.

I. PROPERTY AND PERFORMATIVITY

Over the past several years, humanities scholarship has focused quite extensively on performance theory to explain many aspects of identity and social organization across time and space. Today, a large number of projects focusing on social inequalities have actively inculcated performance theory, particularly a substantial number of projects dealing with race, gender, and sexual orientation. Its rich body of insight has helped explore how social norms and codes operate to govern outward expression—indeed, everything within human behavior—including dress, speech, articulation, and other mannerisms. By exploring the power of performance on our everyday lives, its body of work has also offered academics a host of insights regarding the varied responses of the audience to these performances.

A. *The Performance and the Performer*

Generally, when we think of a “performance,” we tend to conjure up an image of a scripted set of statements, actions, and activities that are fully anticipated, planned, and enacted down to every last detail, including stage, costume, antics, language, with an audience in rapt attention. We imagine a “performance” to be something separate from everyday life and behavior. We tend to think of actors, stepping outside of their everyday roles as individual beings and adopting particular identities that are assertively divorced from their own. The beauty of the stage is premised on this artful separation between art and life; it offers us a world of escape and freedom in fantasy. The actors are endowed with the ability to transform their identities by adopting an on-stage presence, and the audience is asked to become a partner complicit in the formation of a fantasy. The actor is employed, partly to facilitate this separation, and the theatre becomes the site at which real life becomes transgressed; fiction transgresses fact, and fantasy becomes the result.

Scholarship on performance theory actively distances itself from the idea of a clear delineation between the performances of life and the performances of art and argues instead that everyday life and activities both capture and enable elements that bear a stark resemblance to theatrical rendition and expression.²⁸ At its most basic level, performance theory focuses on the linkage between language and conduct within this sphere.²⁹ According to J.L. Austin, author of the influential work *How to Do Things With Words*, there are two kinds of language: language that is declarative or merely descriptive, and language that is performative in the sense that its expression or verbalization accomplishes a particular act, such as one’s marriage vows.³⁰ The latter involves a series of “performative utterances,” words

28. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

29. A few works in legal scholarship have begun exploring the role of performance theory and its relationship to specific types of regulation. See, e.g., JUDITH BUTLER, *EXCITABLE SPEECH* (1997); J.M. Balkin & Sanford Levinson, *Law as Performance*, in 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 729 (Michael Freeman & Andrew D.E. Lewis eds., 1999); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719-20 (2001); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (reviewing JEROME MCCRISTAL CULP & ANGELA P. HARRIS, *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)); Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124 (2003); Katherine M. Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541 (2001); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

30. See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 5-6 (J.O. Urmson ed., 1962); MARVIN CARLSON, *PERFORMANCE: A CRITICAL INTRODUCTION* 60 (1996) (describing

that do something more than simply report details or facts, comprising something more than language alone.³¹ Instead, they constitute a sort of linkage between speech and conduct and thus involve the performance of some action, a "speech act."³² As Austin states, the performative utterance is more than simply a set of words. Instead, he argues that many declarations accompany acts and, in doing so, actually become acts themselves, indivisible from their original position as words alone.³³ For Austin, the success or failure of a performative utterance must not be measured by the ordinary boundaries of truth or falsity that are used to govern language, but instead by the success or failure of the given act in question.³⁴ Therefore, meaning is comprised of the conflation between speech and conduct or as one theorist notes, "[t]o put it bluntly, expression dictates meaning."³⁵

Austin suggests that language is in and of itself a performative endeavor and everything that we see as "real" and embodied or material is actually inseparably linked to the linguistic structures that create and compel performances and expression.³⁶ Austin's primary example includes the statement: "[I] take this woman to be my lawfully wedded wife."³⁷ In this statement, both conduct and language come together to produce a discernible act of legal significance, something greater than words alone. As performance theorist Judith Butler has argued, a performative act creates meaning

performative statements that are not in the first person present tense form as implicit performative statements).

31. See AUSTIN, *supra* note 30, at 5-6 (stating that this term is derived from the verb *perform* which indicates that the utterance is more than just saying something, it is the performance of an action); see also ANDREW PARKER & EVE SEDGWICK, *PERFORMATIVITY AND PERFORMANCE* 9 (1995) (discussing an example provided by Austin of the phrase "I dare you").

32. See Kent Bach, *Speech Acts*, in *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* (Edward Craig ed., 1998), available at <http://online.sfsu.edu/~kbach/spchacts.html> (noting that each speech act is comprised of the performance of several acts differentiated by the intent of the speaker).

33. See AUSTIN, *supra* note 29, at 8 (explaining a circularity in performative utterances because uttering the words leads to the performance of the act, even though the performance of the act is the object of the utterance).

34. See CARLSON, *supra* note 29, at 60-61 (noting that successfully achieved performative statement was called felicitous by Austin whereas an unsuccessful statement is referred to as infelicitous).

35. See Theresa M. Senft, *Cyborgs, Gender, and Performance*, *WOMEN AND PERFORMANCE*, Winter 1997, <http://www.echonyc.com/~janedoe/writing/performative.html> (explaining the concept of performance as discussed by linguistics theorist J.L. Austin and feminist theorists).

36. See AUSTIN, *supra* note 29, at 12 (clarifying that performative utterances are not utterances that can be considered true or false but rather are phrases that actually accomplish something).

37. *Id.*

through both signifying and enacting language itself—a perfect convergence between speech and conduct.³⁸ This central notion of language as a series of performances, rather than as a series of statements alone, is an important contribution to the study of law because it suggests that performance, just as much as language itself, informs the relationships between an individual's identity, experience, and the production of social norms surrounding regulation.³⁹

More recent performance theory both supplements and fractures Austin's original understanding in multiple ways. As some theorists have pointed out, a performance can be a site for either resistance or conformity and much depends on the intention of the speaker, the reception of the audience, and the context in which the performance is offered. What this means is that a performance is not just a process of negotiation that occurs in the abstract but that the audience has just as much power as the author or performer of a given text in the creation of meaning. In short, contemporary performance theory captures the notion of "a radical estrangement between the meaning and the performance of any text."⁴⁰ In this context, performance theory is especially powerful because it forces us to rethink the relationships between the audience and the self. The intersection of speech and conduct within language serves as a sort of border and site of negotiation that empowers the audience, as much as the individual performer, through the power of interpretation.⁴¹

This altogether brief explication of performativity suggests a triangular relationship between the creator of a text, the performer, and the audience.⁴² This triangulated relationship, however, does not always operate harmoniously. For example, one primary layer of conflict over interpretation takes place between the *performer* and the *author* of a particular text or script in a performance. As the performer struggles to embody an ideal, he or she continually modifies the original through the commission of the performance, altering its meaning. Indeed, some performance scholars, namely ethnolinguist Richard Bauman, have argued that performance thus

38. See Judith Butler, *Burning Acts: Injurious Speech*, 3 U. CHI. L. SCH. ROUNDTABLE 199, 200 (1996).

39. See Poirier, *supra* note 29, at 153-54.

40. See PARKER & SEDGWICK, *supra* note 31, at 3 (quoting PAUL DE MAN, ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST 298 (1979)).

41. See CARLSON, *supra* note 29, at 20 (analyzing the differing views of social anthropologists on performance and its relationship with everyday life).

42. See J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1530 (1999) (suggesting that this relationship may be hidden when reading to oneself as the role of interpreter and audience merge).

requires a form of double consciousness within the self "through which the actual execution of an action is placed in mental comparison with a potential, an ideal, or a remembered original model of that action."⁴³ Bauman's idea suggests that the role of the audience and preordained social norms play a key role in "marking" certain activities as performances and actively distinguishing them from other types of activities. However, Bauman suggests that this tendency is not limited to theatrical performances alone, but indeed extends beyond to the performances in everyday life, constructing and reconstructing meaning in much the same way. The only difference is that the stage is one of simple everyday reality and the script is unwritten, best judged by the same cultural codes and expectations as any other performance. Somewhat similarly, Jack Balkin and Sanford Levinson have written about "the responsibilities of performance," analyzing whether an actor has the responsibility to perform a text with which he or she may disagree.⁴⁴ In their exploration, the authors unwittingly celebrate the agency of the performer, noting that the performer plays a powerful role in the communication of a text's original or revised interpretation.⁴⁵

These observations also indicate the emergence of a second area of conflict between the *audience* and the *performer*, which suggests an important canon concerning audience receptivity.⁴⁶ This second layer of conflict, offered by contemporary performance theorists, suggests a site of conflict between the audience and the performer, with the audience having the power to choose how to respond to a particular text. The audience, as well as the speaker, receives and constructs through the lens of their own experiences and expectations. As Michael De Certeau has written, "[E]very reading modifies its object.' . . . The reader takes neither the position of the author nor an author's position. He invents in the text something different . . . he combines their fragments and creates something unknown."⁴⁷ This process of creating one's own interpretation is called "textual poaching."⁴⁸ Quite unlike the perception of a passive

43. CARLSON, *supra* note 29, at 5.

44. See Balkin & Levinson, *supra* note 42, at 1530-35 (discussing how traditional performances may be adapted to conform to societal values, especially when the performance is intended for a public audience).

45. See *id.*

46. For an excellent introduction to the study of audience reception, see THE AUDIENCE STUDIES READER (Will Booker & Deborah Jermyn eds. 2003).

47. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 169 (Steven Rendall trans. 1984) (quoting MICHEL CHARLES, RHÉTORIQUE DE LA LECTURE 83 (1977)).

48. See HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 24-27 (1992) (comparing de Certeau's characterization of poaching to the way in which today's fans interact with the media culture); Kris Larsen, *In Defense of*

audience, performance theory suggests that individual viewers play an enormously powerful role in the construction of a text and its social meaning. The audience has the following choices to make: (1) adopt either the proffered or dominant 'codes' offered by the speaker, (2) adopt a negotiated stance where the reader might modify the code in a way that reflects their own experiences and interests, or (3) create an oppositional reading that enables the reader to reject and oppose the dominant meaning offered.⁴⁹ The choice is up to the interpreter, but that choice heralds an important, supplementary dimension to the development and protection of intellectual property. The audience plays just as powerful a role in the construction of authorship as the original creator.

These observations do not merely operate in the abstract depictions of legal theory. They have powerful implications for how or whether an audience member (or performer for that matter) chooses to reconfigure an existing text, particularly in cases where a performer might re-enact narratives that operate to exclude other perspectives. For example, consider again Austin's central statement of the performative in everyday language: "[I] take this woman to be my lawfully wedded wife."⁵⁰ Under Austin's view, the utterance of this statement constitutes a legally significant act. Yet recent scholarship on performance theory, in addition to recognizing the power of the speech act, also points out the manifold possibilities for the audience's own choice of responses to the performative statement. As Andrew Parker and Eve Sedgwick have persuasively argued, Austin's example subtly (and problematically) associates a sort of normalcy with the first-person who confidently appeals to state authority and requests the presence of others as "witnesses" to observe the marriage.⁵¹ However, under Parker's and Sedgwick's insightful treatment, an audience member, as a witness, can make certain choices that illustrate her own exclusion from this commonplace

Slash, U.N.C.L.E. FAN FICTION IN PRINT, <http://www.manfromuncle.org/krisl.htm> (last visited July 26, 2006) (discussing how slash fan fiction, as a form of textual poaching, allows fans to rework text in a way that is more satisfying to themselves as the audience).

49. See Stuart Hall, "Encoding/decoding," in Centre for Contemporary Cultural Studies (Ed.): *Culture, Media, Language: Working Papers in Cultural Studies, 1972-79* (1980), at 128-38, and Daniel Chandler, *Semiotics for Beginners: Encoding/Decoding*, <http://www.aber.ac.uk/media/Documents/S4B/sem08c.html> (last visited July 26, 2006) (analyzing Hall's concept of encoding and decoding as the "creation and interpretation of texts" and applying it to a reader's reaction to mass media).

50. AUSTIN, *supra* note 29, at 12.

51. See PARKER & SEDGWICK, *supra* note 31, at 10 (explaining that Austin offers an implicit, unstated suggestion that the speaker only attains agency according to his "over-identification with the powers of the state and the church").

narrative, thereby illustrating its problematic limitations:

Any queer who's struggled to articulate to friends or family why we love them, but just don't want to be at their wedding, knows it from the inside, the dynamic of compulsory witness that the marriage ceremony invokes. . . . It is the constitution of a community of witness that makes the marriage; the silence of witness (we don't speak now, we forever hold our peace) that permits it; the bare, negative, potent but undiscretionary speech act of our physical presence—maybe even especially the presence of those people whom the institution of marriage defines itself by excluding—that ratifies and recruits the legitimacy of its privilege.⁵²

Parker's and Sedgwick's eloquent formulation implicitly captures the power of Austin's speaker to elide the agency of the audience, just as they observe the power of the audience to subvert or submit to the speaker's formulation. This moment of reception constitutes a series of questions, rather than presumptions, for the role of queer performativity, including the naturalness of the suggestions as made by Austin and the choice of audience response.⁵³ As Parker and Sedgwick subtly remind us, an audience member has the power to choose differently and to resist the dominant imperative of "compulsory witness" that marriage invokes by reworking its elements both from the inside, as well as the outside, of the marriage construction. An audience member, by choosing between presence and absence at a wedding, decides whether or not she remains complicit in the construction and performance of heterosexual privilege. In short, by celebrating the agency of the audience, queer performativity allows for a political reworking of the property of language in order to reveal its true essence as a performance—a set of beginning points for dynamic recoding and appropriation.

B. The Audience and the Author in Copyright

The two areas of conflict I have outlined, between the performer and the creator and between the author and the audience, also give rise to a third area of potential conflict, which involves the ways in that the law regulates such expression through a series of technological, legal, and cultural constraints. Here, law gives rise to a potential area of divergence between *property* and *performance*, which is uniquely mirrored by the preexisting tensions between intellectual property (which honors exclusion) and expression (which honors inclusion within the marketplace of ideas).

Through its emphasis on originality, copyright law tends to place

52. *Id.* at 10-11.

53. *See id.* at 10.

the author or creator at the center of property ownership, a principle which relies upon the image of the romantic author.⁵⁴ Legal experts observe that this idea of the romantic author emerged in the eighteenth century, in an environment that was ripe for cultural and economic change.⁵⁵ Through this transition, a work became viewed as an expressive part of the author's personality, and the author therefore served to "guide" the reader towards his or her "true" interpretation.⁵⁶ As a result, just as a property owner has the right to exclude others from using his land, copyright law enables the owner to prevent others from unauthorized uses that may unfairly appropriate elements from an original text or, more abstractly, muddle the author's original intent and meaning. Within this system, intellectual property ownership is considered a sacred, primary, and dominant entitlement, thereby affecting the scope and expression of competing appropriations.

Despite its operational tendency to honor the romantic author, the original architecture of copyright law is somewhat delicately poised between the themes of property and performance. The property theme, which has taken on greater emphasis in modern times,⁵⁷ suggests a sort of fixed, unitary, thing-like character that remains largely static, stable, and resistant to modern change.⁵⁸ However, the performance theme is still indelibly powerful, which suggests that fair use provisions that allow commentary, criticism, news reporting, and the like also allow for copyrighted texts to become fluid, indeterminate, and multi-dimensional pieces that permit interactions between the performer and the audience. This interaction between the audience and the author suggests the emergence of a competing view of authorship that stems from postmodern accounts. As Laura Heymann has observed, while the romantic view of the author regarded the writer as indistinguishable from his work, the

54. See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 878 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION (1996)) (discussing how the notion of the romantic author causes the courts to sympathize with the author and thereby overemphasize the author's work as being unique while minimizing any outside factors that played a role in the authorship).

55. See Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark*, 80 NOTRE DAME L. REV. 1377, 1387 (2005) (describing the rise of the printing press and the "decline of patronage" as two factors that contributed to the advent of the author as both "a creative and economic progenitor").

56. See *id.* at 1387-88, 1390.

57. See Lemley, *supra* note 53, at 902 (claiming that intellectual property law is becoming "properitized" in the modern era).

58. See generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 530-34 (2001) (addressing the growing tendency to consider culture as a "thing").

postmodern notion of the author understands that collective efforts actually play a large role "both as part of the creative process and as part of the interpretative process."⁵⁹ "Both authorship and interpretation are indeterminate and variable no matter what name appears on the cover of a book."⁶⁰ The contemporary tendency towards decentralization in interpretation and creation owes much to the rise of mechanical reproduction, which, according to Walter Benjamin, has led to the creation of mass copies that tend to reduce the authenticity and the authority of an original work.⁶¹ Reducing the authenticity of the original work can also give rise to audience empowerment with the audience now drawing on existing interpretations to create their own versions of authenticity in interpretation.

To be sure, there is strong precedent to support some kinds of audience participation within copyright, even when the ideas expressed involve depictions that we may find uncomfortable or unwholesome. Indeed, the laws of intellectual property premise their very existence on carving out a protective space for such commentaries to exist in order to ensure that intellectual property retains a non-exclusive, non-sovereign character that comports with basic First Amendment values. Copyright and trademark law, for example, contain implicit defenses for some kinds of parodic commentary but not others, drawing a firm line between parody and satire.⁶² The desire to rework and renegotiate meaning, however, is a power that belongs squarely with the audience, rather than the original speaker. In many cases, these expressions take the form of parody, satire, or pastiche—all of which aim to offer subversive readings and interpretations of the same script. Parody, which stems from the term *parodeia*, is best described as "a song sung alongside another."⁶³ The idea of a parody is to use some elements from a prior

59. Heymann, *supra* note 55, at 1391.

60. *Id.*

61. See Coombe, *Author/izing the Celebrity*, *supra* note 25, at 373-74 (citing Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 243 n.5 (Hannah Arendt & Harry Zohn trans., 1968)) (noting that mass reproduction allows a work to exist independently from the original copy and thus upset the traditional notion that an artwork is a concrete, distinguishable presence in history and culture).

62. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

63. See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1440 & n.3 (6th Cir. 1992) ("Parodeia' joins the Greek words for 'beside' and 'to sing'—the roots of our prefix 'para' and our word for a lyric poem 'ode.'" (quoting 7 Encyclopedia Britannica 768 (15th ed. 1975))); Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546 (1998) (discussing the societal importance of parody, satire, and burlesque as art forms and their treatment by the courts); see also MARGARET A. ROSE, PARODY: ANCIENT, MODERN AND POST-MODERN (1993); PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM-

author's work in order to reinterpret and subvert the intended meaning by offering a commentary on the original.⁶⁴ "The rhapsodists who strolled from town to town to chant the poems of Homer," writes author Isaac D'Israeli, "were immediately followed by another set of strollers—buffoons who made the audiences merry by the burlesque turn which they gave to the solemn strains."⁶⁵ Closely related is the modern understanding of mimicry, which is derived from Platonic conceptions of *mimesis* and focuses quite directly on the importance of repeating and enacting certain norms of behavior.⁶⁶

Parody thus allows for the creation of properties that suggest the nonexclusivity of behavior, but it also offers us a vision of non-exclusivity in property as well. Rather than the creator controlling the meaning and representation of a given text, parody instead suggests the existence of other, alternative readings. In this way, parody enables properties to become nonexclusive, non-sovereign entities. The audience actively participates in remaking the original performance, imbuing it with a new, particularly expressive quality. Through the law's protection of parody, property becomes a dialogue, instead of a one-way transmission of meaning.

The dynamic of copyright regimes operates as a stage, but also as a silent translator of the performance by helping the audience to guide its reception of the meaning and difference between the self and the ideal. In turn, the audience's reception also modifies the text, giving rise to a process of dialogue that paves the way for audience appropriation and creation. In the next two Parts, I will apply these somewhat abstract notions to the creation of fan fiction, specifically slash fan fiction. I will show how the participation of female authorship in fan communities radically changes the production, reception, and "recoding" of particular texts and yields a host of oppositional possibilities for the interpretation of a copyrighted text through the deconstruction of gender categories.

II. FEMALE APPROPRIATION OF POPULAR CULTURE: THE STORY OF SLASH

While the above theories promise a wide degree of abstract

AND AFTER (Dwight MacDonald ed., 1960) [hereinafter PARODIES].

64. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (holding parody as a type of fair use).

65. See PARODIES, *supra* note 63, at 562 (quoting ISAAC DISRAELI, CURIOSITIES OF LITERATURE (Everett Franklin Bleiler ed., Dover Publications 1964) (1849)).

66. See CARLSON, *supra* note 29, at 175 (contrasting mimicry with a process called "miming" which allows artists to achieve a critical purpose).

thought, they also force us to contemplate the limits and possibilities of a world that allows the audience to take an active role in the construction of meaning alongside a given performance. As I have suggested, performance theory suggests a sort of rivalrous relationship between the performer and the audience. The two are interdependent but are also deeply conflicted with the possibilities of internal rebellion. Therefore, rebellion and resistance take the form of unmaking and unraveling a given text to emulate or challenge the very notion of the ideal by reworking performances and encoding them with specific and new understandings and expression. Thankfully, today such imaginings are not merely in the abstract; today, performance in another "world" is possible through cyberspace, enabling persons to remain anonymous, adopt alternative personae, and create multiple works, texts, visuals, and so on. As Professor Sherry Turkle has written, "[w]hen we step through the screen into virtual communities, we reconstruct our identities on the other side of the looking glass."⁶⁷

Fan fiction is an integral part of this development, but it depends on the law's protection of underlying interests for its flourishing and protection. Law becomes implicated in every stage of this process, from protecting privacy to protecting expression.⁶⁸ As I suggested earlier, the Web's participants are often pseudo-anonymous citizens, able to create because their identities are shielded by a web of technological constraints on transparency.⁶⁹ Indeed, fan fiction depends integrally on a peculiar paradox within cyberspace: the existence of "personal privacy in a public forum."⁷⁰ Partly as a result,

67. SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 177 (1995).

68. See Kylie Lee, *Confronting 'Enterprise' Slash Fan Fiction*, 44 *EXTRAPOLATION* 69, 73 (2003) (considering, for example, one woman's account that the use of pseudonyms on the Internet makes creating content that is taboo or socially unacceptable easier). "It's one thing for your co-workers, domestic partners, or children to know you're a 'Trekkie,' it's another to know you're a producer of pornography with gay overtones." While the author's observations oversimplify the complex narratives at issue in slash fan fiction (i.e., that it is not always considered "gay" or pornographic), her considerations of privacy are evident in her desire to publish. Elsewhere the author reminds the reader that she uses a pseudonym "to protect [her] privacy for the sake of [her] family," and to dissociate her real name, which is attached to publications on literary criticism and medical articles, from her slash name. *Id.*

69. See Philip E. Agre, *The Architecture of Identity: Embedding Privacy in Market Institutions*, 2 *INFO., COMM. & SOC'Y* 1, 3 (1999) (assuming that privacy arises at the regulation of these computerized records and their uses by institutions).

70. See Sharon Cumberland, *Private Uses of Cyberspace: Women, Desire, and Fan Culture*, MIT COMM. F. (2000), <http://web.mit.edu/commforum/papers/cumberland.html> (suggesting that the anonymity and freedom afforded by the Internet has allowed women to challenge social constructs by expressing themselves in unconventional ways).

the Internet has enabled us to think about identity in terms of multiple selves, rather than in terms of a singular, unitary self.⁷¹ Turkle's work, for example, exploring multi-user domains (MUDs) in cyberspace has led her to conclude that virtual domains allow a person to "play a role as close to or as far away from your real self as you choose."⁷² As a result, the virtual persona has never before appeared so filled with limitless expression and possibility. While much of Turkle's exploration is limited to role-playing games, her conclusions can be profitably reframed to cover many aspects of identity and personhood in cyberspace. "When each player can create many characters and participate in many games," Turkle explains, "the self is not only decentered but multiplied without limit."⁷³

Today, especially, the need for informational privacy extends, at least in cyberspace, to the architecture of identity and anonymity. Indeed, one might say that it extends to the very act of creating multiple personae online, whether they encompass a fictional character or a human being. Even outside of structured forums, a user can adopt a multiplicity of gender, sexual, racial, or other categorical identities, invent accompanying personal histories, and engage in a multiplicity of various acts that she would likely not perform in real life.⁷⁴ Here, we see an important implication for the role of anonymity in cyberspace—it enables the circulation and production of particular types of creativity that could never flourish without such protections. In other words, virtual space allows individuals to construct identities that they choose for themselves, rather than the ones with which they are born.⁷⁵

A. Theorizing Slash Fan Fiction

Such diversity of possibilities extends to multiple areas of creation in cyberspace—the creation of the self, along with the possibility of (re)creating other texts. Dan Hunter and Greg Lastowka have written

71. See *id.* at 178-79 (explaining that on the Internet "people are able to build a self by cycling through many selves"). For example, one woman described her "self" over the Internet as more confident, more the person that she wanted to be but was not face-to-face. *Id.* at 179.

72. *Id.* at 183.

73. *Id.*

74. See TURKLE, *supra* note 66, at 212 (discussing the relative ease of gender-swapping on the Web).

75. See *id.* at 226, 240 (asserting that MUDs, in particular, provide scenarios for individuals to enact otherwise impossible fantasies, while avoiding the social repercussions of such actions); see also Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1153 (2000) (discussing opportunities to dismantle or alleviate racial conflict in cyberspace).

that cyberspace allows for the creation of an "amateur-to-amateur community," where individuals from all walks of life participate in the creation and circulation of content with no desire to own the content or profit financially from it.⁷⁶ Here we see vast examples of audience interactivity in fan fiction, which involve stories that are written about particular characters from popular television shows, movies, and other cultural texts. In some ways, fan fiction reverses the classic distinctions that are often drawn in cultural media between producer and creator, affecting gendered assignments in the process.⁷⁷

Professor Henry Jenkins has suggested that fan fiction heralds a return to earlier modes of communal storytelling in which great sagas would pass through oral tradition and narrative. He argues that "[f]an fiction is a way of the culture repairing the damage done in a system where contemporary myths are owned by corporations instead of owned by the folk."⁷⁸ Our tradition of oral narratives led to countless individuals telling and retelling stories, adding new elements to preexisting creations.⁷⁹ Initially, in the 1980s, fan fiction was often widely inaccessible because it was only circulated through "fanzines," which tended to be produced on a very limited scale.⁸⁰ While zines (self-produced magazines) had been traditionally non-profit entities in real space, they were often rather low-budget and rarely numbered more than demand required.⁸¹ However, on a very basic level, the advent of the Internet opened up a wide array of publishing opportunities for people from all walks of life.⁸² Given the

76. See Dan Hunter and F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 955-56 (2004) (describing, for example, the creation of web logs that distribute information freely over the Internet and their increasing popularity among contemporary society).

77. See generally Coombe, *Author/izing the Celebrity*, *supra* note 25, at 384-86; Mia Garlick, *Player, Pirate or Conductor? A Consideration of the Rights of Online Gamers*, 7 YALE J.L. & TECH. 1, 14-15 (2004-05); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655-58 (1997) [hereinafter Tushnet, *Legal Fictions*]; Meredith McCardle, Note, *Fan Fiction, Fandom, and Fanfare: What's all the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 441-44 (2003); Cecelia Ogbu, Note, *I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners*, 12 S. CAL. INTERDISC. L.J. 279, 286-88 (2003).

78. Amy Harmon, *In TV's Dull Summer Days, Plots Take Wing on the Net*, N.Y. TIMES, Aug. 18, 1997, at A1.

79. See McCardle, *supra* note 77, at 438 (surveying the historical practice of borrowing from prior works of fiction and the legal efforts to curb copyright violations).

80. See Celandine Brandybuck, *Slash Fanfiction: A Personal Essay*, FANFIC SYMPOSIUM (2004), <http://www.trickster.org/symposium/symp158.html> (providing basic definitions of fan fiction and evaluating its proliferation on the Internet).

81. See Anne Kustritz, *Slashing the Romance Narrative*, 26 J. AM. CULTURE 371, 372 (2003) (asserting that by the mid-1990s, the sundry forms of fan fiction had become a predominantly digital phenomenon).

82. See *id.* (indicating that the number of fan fiction readers also increased along

much lower costs of printing and publicity, it became possible for authors of fan fiction narratives to reach a wide readership for their work and to create huge communities across cyberspace as a result.

While the world of fan fiction is both diverse and expanding⁸³ and has been studied at some length both inside and outside of the legal academy, it represents an important culmination of the theories we explored above regarding the power of the audience in receiving and reworking performances. Like the audience's power to recode and reinterpret meaning, fan fiction enables individuals to engage in widespread and active appropriation of given texts, plots, characters and to build alternative communities and marketplaces of expression. Fan fiction, therefore, is not an extreme departure from societal norms, but is a compromise between the original text and the reworking done by fans.⁸⁴ Jenkins offers a litany of examples of audience appropriation in his work *Textual Poachers*, ranging from collectives that actively reread, gossip, and discuss given texts to those that engage in full-on rewriting of scripts and plots.⁸⁵ Some fan fiction writers may attempt to "recontextualize" a program by adding scenes that help to clarify omissions in plots and explain a character's motivations.⁸⁶ They may also seek to write texts that expand the timeline of the series, develop secondary or villainous characters who are underexplored in the central series, blend two or more series to create a new product, or eroticize relationships between characters.⁸⁷

This Article focuses more specifically on this last category of fan fiction, which comprises a particular type of fan fiction known as "slash" that focuses mainly on developing homoerotic relationships between two, usually male, characters in a television show or motion picture.⁸⁸ Slash receives its name from the typological character that

with its arrival on the Internet, partially because web surfers could discover it in the privacy of their own homes).

83. See Sarah Kendzior, *Who Owns Fandom?*, SALON, Dec. 13, 2003, <http://rchive.salon.com/tech/feature/2000/12/13/fandom/print.html> (describing the occasional legal skirmishes that have arisen between trademark and web domain owners and ardent fans).

84. See JENKINS, *supra* note 48, at 219-20 (explaining fan fiction's dual objectives of reinventing source material, while also retaining the spirit and integrity of the original series):

85. See *id.* at 155 (offering one example of a group of "Beauty and the Beast" fans who, dissatisfied by the third season of the television show, chose to write and publish their own version).

86. See *id.* at 162 (describing how these stories depict off-screen behavior and dialogue that may explain confusing or conflicting on-screen events).

87. See *id.* at 165-77 (discussing other fan fiction writing techniques, such as writing a narrative from an antagonist's perspective and shifting the genre of a television series).

88. See *id.* at 188-89 (defining slash as a combination of love, intimacy, and sexual encounters between men). For more information on slash and other types of fan

occurs between male pairings (e.g., m/m), originating with a number of fan-written stories in the 1970s that centered on developing a relationship between Kirk and Spock in the television program "Star Trek."⁸⁹ As Henry Jenkins has elegantly explained,

When I try to explain slash to non-fans, I often reference that moment in *Star Trek: The Wrath of Khan* where Spock is dying and Kirk stands there, a wall of glass separating the two longtime buddies. Both of them are reaching out towards each other, their hands pressed hard against the glass, trying to establish physical contact. They both have so much they want to say and so little time to say it. Spock calls Kirk his friend, the fullest expression of their feelings any where in the series. Almost everyone who watches that scene feels the passion the two men share, the hunger for something more than what they are allowed. And, I tell my nonfan listeners, slash is what happens when you take away the glass. The glass, for me, is often more social than physical; the glass represents those aspects of traditional masculinity which prevent emotional expressiveness or physical intimacy between men, which block the possibility of true male friendship.⁹⁰

Slash as a genre can take on a variety of different forms—sometimes involving lightly coded romances between male characters and other

fiction, see THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA (Lisa Lewis ed., 1992); Shoshanna Green et al., "Normal Female Interest in Men Bonking": Selections from the Terra Nostra Underground and Strange Bedfellows, in THEORIZING FANDOM 9 (Cheryl Harris & Alison Alexander eds., 1998); Lee, *supra* note 64, at 71; Constance Penley, *Feminism, Psychoanalysis, and the Study of Popular Culture*, in CULTURAL STUDIES 479 (Lawrence Grossberg et al. eds., 1992); Christine Scodari, *Resistance Re-Examine: Gender, Fan Practices, and Science Fiction Television*, 1 POPULAR COMM. 111 (2003); Destina's Fan Fiction FAQ, <http://www.lyricalmagic.com/fanficFAQ.html> (last visited July 26, 2006); Fanfic Symposium, <http://www.trickster.org/symposium> (last visited July 26, 2006); Fan Fiction - A User's Guide, <http://www.bbc.co.uk/dna/h2g2/alabaster/A632062> (last visited July 26, 2006); David Plotz, *Luke Skywalker is Gay?: Fan Fiction Is America's Literature of Obsession*, SLATE, Apr. 14, 2000, <http://slate.msn.com/id/80225>; Zack Stentz, *Vulcan Love Slave*, METROACTIVE ARTS, May 7, 1998, <http://www.metroactive.com/papers/metro/05.07.98/tv-9818.html>; What is Slash?, <http://www.hwslash.net/slash.html> (last visited July 26, 2006). For personal accounts of writing and reading slash, see Brandybuck, *supra* note 80; Hollyllex's Fan Fiction, Slash and Slash Writing - My View, <http://slashcity.org/hollyllex/essays/essayone.html> (last visited July 26, 2006); Allaire Mikhail, Why I Read (and Write) Slash, <http://www.skeeter63.org/~allaire/SlashReasons.html> (last visited July 26, 2006); Thrupkaew, *supra* note 23; Xanthe, I Didn't Know You Were Bi - How Do I Write a Slash Story? (Oct. 2001), <http://www.xanthe.org/site/forum.htm>.

89. See Kustritz, *supra* note 81, at 371-72 (indicating that these early slash stories were labeled "hurt/comfort" because they involved one character consoling another due to some sort of emotional or physical injury). Such platonic narratives are currently dubbed "smarm" in order to differentiate them from slash, which deals with comparably more graphic content. *Id.*; see also The Complete Starfleet Library, 1985 Star Trek Books, <http://www.well.com/~sjroby/lcars/1985.html> (last visited July 26, 2006) (discussing one officially licensed *Trek* novel that contained slash elements: the 1985 novel *Killing Time* by Della van Hise).

90. Green et al., *supra* note 88, at 19-20 (quoting Henry Jenkins, *Confessions of a Male Slash Fan*, 1 STRANGE BEDFELLOWS (May 1993)).

times depicting graphic sexual activity.⁹¹ For example, many story lines involve a heartless female character who romances the male protagonist, only to abandon him later.⁹² The wounded and bitter protagonist then turns to his “buddy,” another heterosexual male who is described as “always available, constantly sympathetic, and may be the only person on the planet allowed to see the hero cry.”⁹³

Although it was initially met with opposition in the fan community,⁹⁴ media theorist Constance Penley has described the “slash phenomenon as one of the most radical and intriguing female appropriations of a popular culture product that [she] had ever seen,” and notes that it demonstrates “how women, and people, resist, negotiate, and adapt to their own desires this overwhelming media environment that we all inhabit.”⁹⁵ Today, slash has grown into a multi-varied pursuit, comprising a significant place in the world of fandom.⁹⁶ While authors of slash fan fiction come from all different types of backgrounds and orientations, it is widely held that the largest number of slash writers are heterosexual or lesbian/bisexual women who write not for profit, but for their own artistic pleasure and creativity.⁹⁷ Jenkins describes slash as “a reaction against the construction of male sexuality on television and in pornography; slash invites us to imagine something akin to the liberating transgression of gender hierarchy. . . .”⁹⁸ Slash does this by rejecting the notion that gender roles are fixed and predetermined and embraces the idea that sexuality can be fluid and filled with various erotic possibilities.⁹⁹ In

91. See Brandybuck, *supra* note 80 (theorizing that in the Tolkein and *Pirates of the Caribbean* fandom communities, the abundance of gay male slash fiction is due largely to the dearth of female characters in the source narratives).

92. See Kustritz, *supra* note 81, at 376-77 (observing that while female slash characters function to bolster the male characters’ heterosexuality and to further the story line, their presence in the story is very limited).

93. *Id.* at 377; see also Green et al., *supra* note 88, at 15-17 (describing the various motives offered for why women write slash and rationalizing why women might choose to identify more with a male hero than a female, secondary character).

94. See JENKINS, *supra* note 48, at 187-88 (noting that the fan fiction community in general is divided on its perceptions of slash, some fans find it unacceptable to depict well-established characters acting in new and unfamiliar ways, while others find homosexuality morally repugnant).

95. Penley, *supra* note 88, at 484.

96. See Kustritz, *supra* note 81, at 372 (attributing the increase in slash writing to its ability to fulfill some fans’ expansive and otherwise unattainable desires).

97. See Bacon-Smith, *supra* note 23, at 1 (stating that women write and edit over ninety percent of *Star Trek* fan fiction).

98. JENKINS, *supra* note 48, at 189.

99. See *id.* (relating slash fiction’s reaction against traditional constructions of male sexuality on television and in pornography to John Stoltenberg’s ideas of breaking gender hierarchies by resisting the societal requirement of attaching a sexual orientation to oneself).

reworking the theme of close friendship between males, another scholar explains,

... [authors of slash] tear down the traditional formula of romance novels and films that negotiate the submission of a heroine to a hero by instead negotiating the complicated power balance between two equally dominant, independent, and masculine characters. This friendship-based love narrative, along with an equality-centered relationship dynamic, is the overwhelming preoccupation of slash narratives.¹⁰⁰

By taking traditional male heroes and reworking their characters and performances, slash writers are able to dissect, appropriate, and then deconstruct the various elements of male dominance. For example, in stark opposition to the typical dominant male/passive female theme one often sees in popular culture texts, slash depicts two equals involved in a romantic relationship and negates the uneven power balance afforded to women and men by simply removing "gender as a governing and determining force in the love relationship."¹⁰¹ In most cases, women rewrite archetypal hero figures who traditionally tend to propagate women's social marginalization and create narratives that undermine, rather than reinforce this patriarchy by depicting men as softer, more complicated and emotional human beings.¹⁰² Given the absence of strong female characters, many slash writers, Jenkins argues, simply choose "the path of least resistance in borrowing ready-made figures, such as Kirk and Spock, to express their utopian visions of romantic bliss."¹⁰³ Since women are already intimately familiar with the trappings of patriarchal assumptions, many women may find it easier to rework and recode these conventions from within rather than starting from an entirely new set of conventions.¹⁰⁴ Slash has spawned a wide array of genres flowing from its original idea, including femmeslash (work that explores homoerotic relationships

100. Kustritz, *supra* note 81, at 377.

101. Lee, *supra* note 64, at 78 (citing Patricia Frazer Lamb and Diana L. Veith, *Romantic Myth, Transcendence, and Star Trek Zines*, in *EROTIC UNIVERSE: SEXUALITY, AND FANTASTIC LITERATURE* 235, 254 (Donald Palumbo ed., 1986); see also CAMILLE BACON-SMITH, *ENTERPRISING WOMEN: TELEVISION FANDOM AND THE CREATION OF POPULAR MYTH* 249 (1992) ("Many slash fans declare they write about men together because men, holding power, can relate to each other as powerful equals."); Larsen, *supra* note 48 (claiming that since males are usually protagonists, audiences also tend to readily identify with them instead of their secondary female counterparts, which also helps to explain the presence of male homosociality in such narratives).

102. See Kustritz, *supra* note 81, at 383 (asserting that while some critics underestimate the significance of slash fan fiction, its importance lies in challenging traditional beliefs that create intolerance and fear).

103. JENKINS, *supra* note 48, at 196.

104. *Id.*

between female characters).¹⁰⁵

According to Francesca Coppa, fan fiction's obsession with the body, in addition to its focus on repetition within the world of media fandom, underlines its character as a species of dramatic performance, rather than a purely literary enterprise.¹⁰⁶ She argues that fan fiction captures the value of returning to and reworking the same text in order to redesign and reenact various scenarios.¹⁰⁷ However, it accomplishes this reworking largely by appropriating and thus decontextualizing a character from an original work.

The existence of fan fiction," she writes, "postulates that characters are able to 'walk' not only from one artwork into another, but from one genre into another; fan fiction articulates that characters are neither constructed or owned, but have. . . a life of their own not dependent on any original 'truth' or 'source.'¹⁰⁸

Through fan fiction, characters and story lines take on a performative dimension that captures both the agency of the audience as well as the potential to rework property into performance.

Slash also initiates a powerful dialogue between the producers of an item of intellectual property and between its female consumers. By empowering women to undertake their own processes of recreation and building communities within fandom and, in some instances, initiating a dialogue with the show's producers and writers themselves, slash initiates a collaborative exchange between the (usually male) creators and producers of a given series and their (usually female) slash participants. As Jenkins observes, "[f]andom originates, at least in part, as a response to the relative powerlessness of the consumer in relation to powerful institutions of cultural production and circulation."¹⁰⁹ Even though network executives and producers often generate "official" merchandise for fan groups to celebrate and protect a given narrative, slash perpetuates the growth of a parallel industry that celebrates the freedom of imagination, rather than the control of a commodity.

Part of the reason for slash's power and prominence within the world of fandom, I would argue, also stems in part from a significant

105. For a list of informative websites on femmeslash, see Wikipedia, Femmeslash, <http://en.wikipedia.org/wiki/femmeslash> (last visited July 26, 2006).

106. See Francesca Coppa, *Writing Bodies in Space: Media Fan Fiction as Theatrical Performance*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS* (Karen Hellekson and Kristina Busse eds., 2006).

107. *Id.* at 1.

108. See *id.* at 4 (referencing RICHARD SCHECHNER, *PERFORMANCE STUDIES: AN INTRODUCTION* 28 (2002)).

109. JENKINS, *supra* note 48, at 278.

shift in the marketplace of ideas in the last few years. According to theorist Anne Kustritz, traditional media outlets today demonstrate an almost startling degree of reliance on news, rather than stories.¹¹⁰ She argues that this reliance on newsworthy information rather than fantasy creates the perception of "absolute interpretation," a space that leaves no room for multiple retellings or reinterpretations.¹¹¹ As a result of this reliance on external sources of "absolute interpretation," the audience loses the ability to tell their own stories and reinterpret others.¹¹²

Fan fiction, of course, reverses these assumptions. Although there are a host of diverse reasons why women would choose to create homoerotic relationships between men, slash, on a general level, highlights the increasingly participatory culture of cyberspace and the audience's inherent challenge to the author's control over the creation of meaning and subtext. The world of cultural products, according to Kustritz, can be characterized by a division between products that are marketed for the intellectual elite and those marketed to a mass audience for a more basic and immediate pleasure.¹¹³ In this marketplace, some movies, television programs, and books tend to be considered "art objects," which are studied, analyzed, and appreciated by an intellectual elite. These works are thought to be "completely inaccessible to the average individual who lacks a similar educational background."¹¹⁴ In contrast, mass-market products are usually produced by corporations for the so-called "average" audience and usually meant "to serve as amusement and distraction for common people."¹¹⁵

Fan fiction is particularly relevant to unmaking this division because it both intersects with and challenges these long-held assumptions. It enables the "amateur" man or woman to appropriate and recreate scripts from the entertainment industry, exploring new character dimensions and elements. At the same time, however, these new authors (perhaps in part because of their 'outsider' status in the

110. See Kustritz, *supra* note 81, at 372 (citing WALTER BENJAMIN, *The Storyteller*, in ILLUMINATIONS 83, 89 (1968)) (noting that Benjamin states that nothing in contemporary society "benefits storytelling; almost everything benefits information").

111. See *id.* at 372-73 (hypothesizing that the press and mass media present the public with an authoritarian, one-sided account of reality).

112. See *id.* (contending that when society relies almost exclusively on news programs, other cultural products such as storytelling then become viewed as trivial and insignificant forms of communication).

113. See *id.* at 373 (observing that the products of high culture receive formal appreciation and academic scrutiny, while commercial entertainment is not considered serious or significant).

114. *Id.*

115. *Id.*

entertainment industry) add layers of complexity and sophistication to the limited, often formulaic plot lines within traditional entertainment. As one author explains, “[w]e’re taking the passive medium of television and making it active, making it interactive, transforming it from something one simply sits and watches to something one engages in.”¹¹⁶

B. The Deconstruction (and Reconstruction) of Gender as Performance

In this sense, these audience-created narratives demonstrate the power of building a “semiotic democracy,” a term coined by John Fiske that refers to the power of media in enabling audiences to become creators rather than consumers, of cultural symbols.¹¹⁷ Slash writers create because it allows them to recode the world of fandom from a different vantage point; in doing so, it allows them to explore the dynamics of a relationship of “two people in love whose relationship begins from a more equal position than traditional male/female relationships.”¹¹⁸ In other words, by creating a fictional, “equal” world that transgresses gender, it enables women from all walks of life to *slash gender itself*. Its work completely reinvents traditional notions of masculinity and femininity because many of its themes explore the possibility of living outside of these circumscribed boundaries by blending fragments of both into new, unconventional pairings.¹¹⁹ Put another way, by recoding narratives in virtual space, slash allows readers to experience a world of imaginative possibility that transcends the political limitations of the current world in real space on another level. Cyberspace allows female authors to build marketplaces of speech in which they are active participants in creation. In the process, they not only escape the inequalities of the real space marketplace of speech, but they create a new world—one in which the gender of the author plays a minimal role in the construction of the marketplace of expression.

This power can extend well beyond “traditional performances” like television shows, plays, and other types of intellectual property. In fact, it can extend toward the reworking of everyday performances, relationships, and social behaviors, and to the very creation of identity

116. Kass, *Why I Write Slash*, FANFIC SYMPOSIUM, (1999), <http://www.trickster.org/symposium/symp15.htm>.

117. See JOHN FISKE, TELEVISION CULTURE 236, 239 (1987).

118. Brandybuck, *supra* note 80.

119. See JENKINS, *supra* note 48, at 193 (describing the relationship between Kirk and Spock as an example of an androgynous coupling because each figure embodies characteristics of both genders without the traditional markings of gender hierarchies).

itself. Performativity, parody, and mimicry when used by the audience can radically change the way we think of gender in both law and life. For example, Luce Irigaray, a prominent French theorist, emphasizes the importance of "play[ing] with mimesis."¹²⁰ She has suggested that women should "assume the feminine role deliberately" in order to create a certain excessive imitation that acts to undermine and challenge forms of subordination and eventually serves to affirm these acts of resistance.¹²¹ The more these resistant performances occur, the more we question the very politics of representation itself and the more we ask "for whom, by whom, and to what end representation is taking place."¹²²

The most prominent scholar to question some of these tenets is Judith Butler, whose theories of gender performativity essentially comprise the most powerful rethinking of gender and social norms in the past decade. Her work has ruptured identity-based theories of gender and sexuality forcing theorists to confront important linkages between the maintenance of one and the other and to ask whether these categories themselves replicate the very structures feminists hope to challenge. Butler, like Irigaray, asks us, first and foremost, to recognize how gender itself can be a performance; second, she exhorts the audience to reclaim the power of remaking and reinterpreting the cultural constructions of gender as a result. By doing so, her work underlies the liberating possibilities of recognizing gender, not as a fixed and coherent identity, but as an unstable series of performative expectations that can be readily subverted by an active audience.

Butler's central argument claims that the feminist reliance on the category of "women" as a fixed category actually reifies, rather than challenges, the gender hierarchy.¹²³ She argues that these identities are imposed through a host of cultural, legal, and technological processes that "produce" gender.¹²⁴ Instead of comprising an essential part of personhood, she argues that gender itself is a performance, intangible, inscribed on the material body and always yearning for, but not quite representing, the ideal vision.¹²⁵ She

120. CARLSON, *supra* note 29, at 175 (citing LUCE IRIGARAY, *The Power of Discourse, in THIS SEX WHICH IS NOT ONE* 76 (Catherine Porter trans., 1985)).

121. *See id.*

122. *Id.* at 183.

123. *See* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 8-9 (1999) [hereinafter BUTLER, *GENDER TROUBLE*] (positing that feminism should reflect the fluidity of gender and identity rather than purport to represent "women" as a single, concrete identity).

124. *See id.* at 9-10.

125. *See id.* at 17.

begins from the premise that gender does not really exist until performance makes it so and over time and repetition these performances give the impression that gender is a foundational aspect of personhood.¹²⁶ As Kath Weston has commented on Butler's work, "the reification of 'woman' and 'man,' 'masculine' and 'feminine' implies essence where none exists. . . . A person 'is' not feminine, apart from the play of eyeliner and fingernails that points to an interior essence and makes it seem so."¹²⁷

In making these observations, Butler draws on a key facet of the relationship between parody and property. Rather than gender retaining a fixed and immutable essence like property, Butler argues that gender can be readily subverted and hence recoded by audience participation.¹²⁸ To resignify gender Butler argues strenuously for a series of "subversive repetitions" of gender, in order to split off and recode the fictive unity of sex and gender.¹²⁹ Here she seeks to highlight the rhetorical, discursive nature of gender instead of its biological formulations. She focuses on drag performances to demonstrate the importance of reworking the possibilities of gender. Butler argues the importance of recognizing drag and parodies of gender because they implicitly "establish that 'reality' is not as fixed as we generally assume it to be."¹³⁰ She writes:

As much as drag creates a unified picture of 'woman' . . . it also reveals the distinctness of those aspects of gendered experience which are falsely naturalized as a unity through the regulatory fiction of heterosexual coherence. *In imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency.*¹³¹

The very existence of drag, she suggests, is a way for us to challenge gender norms and the rigid expectations that they bring and impose on others.¹³² She asks, "Is drag the imitation of gender, or does it dramatize the signifying gestures through which gender itself is established?"¹³³ and continues, "Does being female constitute a 'natural fact' or a cultural performance, or is 'naturalness' constituted through discursively constrained performative acts that produce the

126. See KATH WESTON, *GENDER IN REAL TIME: POWER AND TRANSIENCE IN A VISUAL AGE* 58 (2002) (explaining that these performances of gender employ visual cues to connote masculinity or femininity, such as mannerisms, clothing, and makeup).

127. *Id.* at 40.

128. BUTLER, *GENDER TROUBLE*, *supra* note 123, at 182.

129. *Id.* at 185-86.

130. *Id.* at 174-75.

131. *Id.* at 175.

132. *Id.*

133. *Id.* at xxviii.

body through and within the categories of sex?"¹³⁴

Here Butler suggests that "drag" performances reveal the true nature of gender: that there is no realness associated with gender and that it comprises a seductive illusion that can be reframed and rearticulated by the audience to suggest the need for its subversion. Through drag's productions of the "realness" of gender, we see a performer or a subject repeating and miming the very norms that have served to discipline and degrade. And, through this performance, those very norms become both legitimized and delegitimized as illusory, confining, and deeply in need of parodic repetition. The process of regulating gender, inevitably, produces these slippages between expectation and behavior and might engender an agency that enables an unconventional set of performances that demonstrates the transferable nature of gender expression.¹³⁵

Like drag performances, slash allows for unconventional pairings that allow both the authors and the audience to explore worlds beyond gender boundaries. In doing so, slash allows individuals to both produce and critique existing texts and author texts that are created in opposition to those in existence.¹³⁶ In this way, slash excavates the performative aspects of gender; by reworking narratives to develop same-sex relationships, it actively subverts the notions of "authenticity" within a given textual narrative. Slash accomplishes in cyberspace much of what drag does in real life. In challenging notions of gender through reworking performance, slash narratives subvert the structural, "natural," and "normal" expectations associated with gender in the process. By recoding these narratives, the writers and their readers are given the opportunity to transcend traditional norms of gender and sexual orientation, demonstrating a world of autonomous possibility. As one slash writer explains:

As a gay person who doesn't consider being gay to be abnormal or bad, I object to the idea that an 'undeclared' character on screen cannot, within the normal framework of life and the universe, be developed as gay. . . . All of which is to say, the screen universe is already an alternative to our own, cultural mores, sexual standards and all; we do not have to consider that a character's sexual choices are dictated by what we consider more likely or most common in our environment. We as viewers certainly don't have to be

134. *Id.* at xxix.

135. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 64 (1993) (discussing how "ideas" of bodies are controlled by societal prohibitions).

136. See Kustritz, *supra* note 81, at 374 (explaining how fan fiction provides its authors the opportunity to recreate the characters and narratives of popular culture in a way that is more representative of their own lives).

governed by what the scriptwriters consider normal for their culture.¹³⁷

Perhaps the most interesting aspect of slash is that the story lines usually involve male-on-male sexual and emotional relationships that are depicted and written by (mostly) heterosexual women.¹³⁸ Within slash (as well as other kinds of fan fiction), authors can utilize a basic story line to develop a peripheral character, often someone who shares qualities of the oppressed in everyday life.¹³⁹ Or they often rework heroes in mass-produced culture, who are ascribed typical patriarchal norms, which Kustritz describes as “unfeeling, unmoving, masterful, and impenetrable” leaving them “emotionless and inexpressive.”¹⁴⁰ Yet, under the creative hands of the slash writer, these heroes become real people, rather than occupy the unrealistic images of masculine perfection.¹⁴¹

While some might criticize slash for its absence of strong female characters or for its utopian romanticism of gay male identity without all of the political trappings and discrimination faced by gay men in the real world, it is still valuable precisely for its ability to present glimpses of a world where love indeed transcends gender.¹⁴² Here, we see a powerful example of the audience’s power in reworking and re-authoring narratives of masculinity, often in opposition to an original text. One writer argues that men in slash stories frequently display a higher degree of “emotional responsibility” than men in real life.¹⁴³ In contrast to professional writers, some writers of slash insist that they are not writing for a gay audience, but instead for

137. See JENKINS, *supra* note 48, at 204-05 (quoting Barbara Tennison, *Strange Tongues*, TERRA NOSTRA UNDERGROUND (1990)).

138. See Kustritz, *supra* note 81, at 376.

According to user polls, these women overwhelmingly rate themselves as mostly to totally heterosexual, between the ages of twenty and forty, and in computer related fields or in graduate school . . . They are most often secretaries, technical consultants, or students who are frustrated by their lack of status in both the social realm and on the job.

Id.

139. See *id.* at 374 (showing, for example, how fan fiction narratives may center on peripheral characters like Uhura, an African American female character from *Star Trek*, to more truthfully represent the lives of African American women).

140. *Id.* at 374.

141. See *id.* at 374-75 (explaining how fan fiction writers repair the damaged characters and create a character that is more human-like with “personalities, faults, needs, and illogical desires, and weaknesses”).

142. See JENKINS, *supra* note 48, at 189-90 (explaining that one of the more important aspects of slash fiction is its ability to question relationships, sexuality, and gender roles, rather than provide concrete answers).

143. See Green et al., *supra* note 88, at 8 (illustrating that slash depicts men who are interested in relationships, are involved in satisfying relationships, and are actively involved in the emotional realm).

themselves.

What women do when they write [s]lash (among a plethora of other motivations) is smash the chains of male sexuality and behavior as proscribed to them since childhood. They use men's bodies, in much the same way that men have always used women's bodies, for their own enjoyment, in situations of their choosing, in a textual arena where they exert total and absolute control.¹⁴⁴

The creation of texts by women often give rise to a host of story lines that frequently challenge commonly held mainstream views.

Moreover, some writers insist that the gender of the parties is unimportant. To be sure, many slash stories are not constructed around typical narratives of "coming out" or other narratives that relate to the gay community or gay identity.¹⁴⁵ Instead, within the world of slash, gender or sexuality is not usually a critical characteristic.¹⁴⁶ In his essay on slash narratives, Jenkins quotes John Stoltenberg who explains that *sensuality* and *sexuality* are different in that sexuality requires that one "not deviate from a particular standard of sexedness" while sensuality "may be experienced in a particular relational context as a transient release from gender altogether."¹⁴⁷ Therefore, it is possible that an individual may achieve a sensual relationship with someone who is not necessarily the "object" of their chosen sexual orientation.¹⁴⁸ In this way, slash represents a powerful, multi-layered degree of audience empowerment that radically transforms the construction of meaning and it represents a revolutionary host of possibilities in audience participation that transcends the limitations of gender and sexual identity. By taking a given (presumably heterosexual) text and reinscribing it with a largely homoerotic theme, slash acts to challenge the productive power of the author and offer a host of radically new

144. Kirby Crow, *The Slash Not Written for a Gay Audience*, SLASHGIRLS, <http://slashgirls.tripod.com/slashrant.html> (last visited July 26, 2006).

145. See Kustritz, *supra* note 81, at 379 (noting the importance of distinguishing between slash fiction and other types of pornography). While overgeneralizations of both types of cultural products are sometimes dangerous, it is important to note that one aspect of pornography that is often critiqued involves its "denial of the emotional consequences of sex." In contrast, in most slash narratives, sex occurs in an emotional context, one that is often developed more fully throughout the story. Here, we see many examples of characters struggling with same-sex feelings or emotional attachment and male characters aiming to develop relationships and narratives that reflect a greater attention to the success of an equal partnership between men. *Id.* at 378.

146. *Id.* at 379 (explaining that gender is of little to no consequence in slash because the story is ultimately one about love).

147. JENKINS, *supra* note 48, at 185 (quoting JOHN STOLTENBERG, *REFUSING TO BE A MAN, ESSAYS ON SEX AND JUSTICE* 106 (1989)).

148. See *id.*

political possibilities for a given narrative.¹⁴⁹

To be sure, fandoms often criticize and debate the finer points of slash. Some argue that it is inappropriate to write narratives that would cause characters to behave "out of character" and others might oppose same-sex representations altogether.¹⁵⁰ One of the greatest sources of debate within the fan community is whether a group of mostly heterosexual female fans can adequately represent the complexities (both physical and emotional) that accompany a male-on-male relationship. To some, there is an implicit degree of homophobia in the depiction of characters who willingly engage in a same-sex sexual relationship, but who explicitly deny previous same-sex experiences or a gay orientation. Some fans explicitly call for additional stories that move beyond a same-sex encounter to depict a more sustained relationship between two men that addresses the more realistic political realities they might face as a gay couple.¹⁵¹

Their concerns are certainly part of the discussion surrounding slash, but they also illustrate precisely how and why the metaphor of fan fiction becomes so powerful. It is *because* the audience of fan fiction interacts with the text that slash writers actively consider the relevance of these debates to their stories. This is a market based on interactivity, as opposed to authorial monopoly. One person may argue that slash represents the possibility of creating an "ideal," genderless human being; another may argue that it provides a space for women to interrogate and discard the restrictions of femininity.¹⁵² Another argues that slash is gay.¹⁵³ Another argues that it is not gay at all.¹⁵⁴ Or that it comprises "neither, or a little of both."¹⁵⁵ According

149. See Kass, *supra* note 116.

We're taking the subtext of queer romance and making it text, which neatly subverts the dominant paradigm. Hear ye, pop culture: you may think heterosexuals rule the airwaves, but we're rewriting your narrative to include a spectrum of possibilities. We're living proof of the ascendancy of postmodernism; everything is surface, and we're scripting new worlds in the interplay between episodes.

Id.

150. See JENKINS, *supra* note 48, at 187-88 (noting one view that slash is actually "character rape" and portraying characters in such way is just "bad writing"); Brandybuck, *supra* note 80 (adding that some people dislike slash only when it is overtly sexual because such writing seems to be out of touch with the original).

151. See *id.* at 220 (noting, for example, that some slash fans believe these narratives have disregarded the AIDS crisis and often romanticize rape and other acts of sexual violence).

152. See Thrupkaew, *supra* note 23 (explaining that slash lets women exert control over men in the same way that patriarchy exerts authority over women by allowing women to "redraft masculinity").

153. See *id.*

154. See *id.*

155. *Id.*

to Jenkins, such debates represent powerful dialogues between readers and audiences from every sexual orientation.

Slash fans are being increasingly drawn into a political alignment with the gay community as they examine the implications of their own writing; they are being educated through letterzines and other fan publications about aspects of the gay experience very foreign, one presumes, to many of the middle-class straight women who were drawn to slash primarily because of their interest in Kirk and Spock.¹⁵⁶

To be sure, Jenkins points out that not all of slash is meant to be progressive or feminist. However, the dynamics of this rich exchange between fans, audience, and readers of slash fiction suggests that such debates can occur without all of the polarization that often accompanies such debates in real space when real-life persons are at issue.¹⁵⁷

Certainly, the world of fandom, like most marketplaces of speech, is not perfect, nor does it purport to be. But the representations offered through slash give us a critical vantage point from which to critique, analyze, and reinterpret the cultural products that are offered within the marketplace. And here is where the role of gender becomes so powerful. Slash allows women, often left out of the marketplaces of content production, to rewrite narratives in imaginative and complicated ways and experiment with, abandon, or recreate notions about gender itself in the process.¹⁵⁸ As the author Henry Jenkins has written, slash is deeply connected to the various ways in which women, throughout time, have continually remade and reworked the narratives that they are often forced to watch. "The school girl required to read a boy's book, the teenager dragged to see her date's favorite slasher film, the housewife forced to watch her husband's cop show rather than her soap, nevertheless, may find ways to remake those narratives, at least imaginatively."¹⁵⁹ As Rosemary Coombe has argued, through slash:

[N]ew genders are inscribed on male bodies, and new desires, experiences, feelings, and practices may therefore proliferate. As well as being alternatively engendered, the male characters are freshly embodied; their bodies are inscribed with ranges of

156. JENKINS, *supra* note 48, at 221.

157. *See id.* at 221-22 (articulating that although not all slash is meant to be progressive, slash at its core always has the potential to be progressive because it generates social communities and social exchanges that question and defy societal norms).

158. *See* Thrupkaew, *supra* note 23 (explaining how slash goes beyond the typical use of popular culture characters in most fan fiction because slash writers use the characters in a way that openly questions societal notions of gender).

159. JENKINS, *supra* note 48, at 114.

sensitivity, expanded zones of erogeneity and a heightened receptivity to tactile pleasures and physical comfort.¹⁶⁰

As a result, Coombe concludes that the watchful and meticulous hands of the slash writer “perform the most thorough practices of ‘doing gender’ that have been examined.”¹⁶¹ Here, like the dialogic relationship between performer and the audience explored above, slash empowers a female reader to actively interact with a given text in such a way that she recognizes the story’s constructed nature and can reconstruct the narrative in such a way that she can explore beyond the on-screen representations.¹⁶²

III. THE GOVERNING POWER OF LAW

Given the complex role that law plays in regulating and therefore subsidizing certain speech over others, it is important to consider how the law governs these commentaries. At a most basic level, the law is implicated in every stage of creation, from the place and mode of creation to the form and content that it takes. Despite the creative impulse that inspires these types of appropriation, the laws of intellectual property, copyright, trademark, and personal property provide remarkably thin or negligible areas of protection for such oppositional readings to occur.¹⁶³ In this sense, such works highlight the intangible possibilities of expression, but they also signify how particular kinds of expression can be owned and accorded a particularly powerful sovereignty that permits an owner to exclude others from utilizing them.

As it is currently fashioned, intellectual property law can act in powerful ways to constrain, protect, or enable these kinds of

160. Coombe, *Author/izing the Celebrity*, *supra* note 25, at 385-86.

161. *Id.* at 386.

162. See JENKINS, *supra* note 48, at 115 (emphasizing that slash fans view the narrative world as an actual place and, in order to keep this view viable, they place great importance on small details, so the imaginary world created in the piece maintains credibility in their eyes).

163. See Note, *Originality*, 115 HARV. L. REV. 1988, 1994 (2002) (indicating that appropriation art “blurs the line between originality and copying and highlights citation and quotation in artistic production”); see also Niels B. Schaumann, *An Artist’s Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 254 n.16 (1997) (citing *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *United Feature Syndicate, Inc. v. Koons* 87 F. Supp 370 (S.D.N.Y. 1993); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993)).

These cases arose out of appropriation artist Jeff Koons’s “Banality Show”. Perhaps even more than Koons, Sherrie Levine has made it clear that copying was the point of her work. By “taking” the pictures and showing them as hers, she wanted it understood that she was deliberately undermining the most hallowed principles of contemporary art: originality, intention, and expression.

Id.

commentary. Each dimension of slash and the way that intellectual property owners have responded to its proliferation in cyberspace demonstrate how law implicitly subsidizes certain types of speech and penalizes others. As one author has argued, “[s]lash allows women ways of writing (collaborative, participatory) that subvert male ways of writing (copyrighted, absolute, and closed).”¹⁶⁴ In a previous article, I have argued that copyright and trademark law perpetuate a dance of opposition, where the law tends to protect only appropriative works that either assimilate or oppose their originally intended meaning.¹⁶⁵ Works that negotiate meanings fall within a separate category of speech and tend to be afforded almost no protection within the spheres of both copyright and trademark because they produce works that are not fully transformative of the original. Instead, they represent examples of “appropriation art,” art that utilizes a preexisting text to create a new work of art that builds upon, but does not completely transform the original.

Yet these types of art, inasmuch as they occupy a significant body of contemporary art, occupy a vulnerable space within the artistic and literary market precisely because of their fragile, potentially illegal legal status. Because of this uncertain legal status, copyright owners utilize a variety of private modes of control demonstrated by random and selective enforcement campaigns against certain groups of fan fiction. However, there is a peculiar irony in confronting the proliferation of fan fiction in cyberspace. The more private copyright owners attempt to control these types of expression, the more they risk alienating the most dedicated segments of their fan base. Fan writers tend to be interested in creating alternative texts while still maintaining loyalty to the original character. As Coombe writes, “[f]ans respect the original texts and regularly police each other for abuses of interpretative license, but they also see themselves as the legitimate guardians of these materials, which have too often been manhandled by the producers and their licensees for easy profits.”¹⁶⁶

Accordingly, producers and publishers have chosen to undertake an approach that at once demonstrates lukewarm tolerance coupled with random, selected incidences of control. This campaign of selective enforcement both reifies and solidifies fan fiction’s vulnerability and leads to the creation of the two following parallel political economies surrounding cultural products: one that

164. Thrupkaew, *supra* note 22.

165. See generally Katyal, *Semiotic Disobedience*, *supra* note 11 (exploring how activist art generates issues concerning the clash between First Amendment principles and intellectual property, real property, civil disobedience, and vandalism).

166. Coombe, *Author/izing the Celebrity*, *supra* note 25, at 388.

represents the commodification of the icon within the mainstream and another that represents its subversion within the parallel universes of cyberspace.¹⁶⁷

A. Protecting Slash Transgression

Despite the creative power of audience interpretation, it is often believed that fan fiction occupies a murky and underexplored area of copyright law, where informal norms tend to govern, rather than actual black-letter legal formulations. In sum, the grey area that fan fiction occupies in copyright is part of a larger tale of how intellectual properization affects different groups. Copyright law's requirements of originality, tangibility, and fixation tend to minimize the contributions of non-market, amateur participants and often penalize them in the process. Recall that copyright law is designed to protect only expression, rather than the idea behind the expression. This is a foundational cornerstone of copyright law, but it has often given rise to a host of confusion, particularly where the protection of literary characters is concerned.

In the 1930 case *Nichols v. Universal Pictures Corporation*, Judge Learned Hand established that the test for protection of a literary character involved the question of whether the character was such an essential part of the text and that he or she was sufficiently developed by the underlying work.¹⁶⁸ In that case, Judge Hand observed:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's 'ideas' in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's Theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking

167. Although this article focuses mostly on copyright law, trademark law has often been used in similar ways as well and carries even greater prominence, given the increasing trend towards merchandising mainstream characters. See, e.g., *MGM-Pathe Commc'ns v. The Pink Panther Patrol*, 774 F. Supp. 869, 871-77 (S.D.N.Y. 1991) (describing a case where MGM, the owner of the Pink Panther trademark, filed for an injunction to stop a gay community advocacy group from wearing t-shirts they had created that said "Pink Panther Patrol" and had a pink paw print on them). The court granted a preliminary injunction of the mark Pink Panther but denied an injunction concerning use of the paw print. *Id.* at 877. The court reasoned that where MGM could show their mark was strong and distinctive, the defendant's mark had a high degree of similarity with their mark, and where there was a likelihood of confusion between the marks, an injunction was warranted. *Id.* at 871-877.

168. See 45 F.2d 119, 121 (2d Cir. 1930).

them too indistinctly.¹⁶⁹

This test, known as the “sufficient delineation” test, attempted to ensure that only well-developed characters received protection from other “stock” characters that did not demonstrate a requisite degree of originality.¹⁷⁰ It has given rise to an inquiry that first focuses on the degree of delineation of a character and then on the degree to which the infringer may have copied from the original.¹⁷¹

Later, the Ninth Circuit diverged from this approach in the famed “Sam Spade” case, which involved a similar question of character protection.¹⁷² The case involved the question of whether Dashiell Hammett, the author of *The Maltese Falcon*, who had granted certain motion picture, television, and radio rights to Warner Brothers, had the right to authorize CBS to create a series of radio broadcasts entitled the “Adventures of Sam Spade.”¹⁷³ The Ninth Circuit held that the rights to the sequel had not been granted to Warner Brothers based on its earlier agreement with the author.¹⁷⁴ They concluded that the characters themselves were mere vehicles to the story being told and were not specifically included within the author’s agreement with Warner Brothers.¹⁷⁵ In analyzing the scope of copyright protection to the character, the Ninth Circuit modified the Second Circuit’s test slightly by asking whether or not the character “really constitutes the story being told.”¹⁷⁶ The court observed that “[i]t is conceivable that the character really constitutes the story being told, but if the character is only the chessmen in the game of telling the story he is not within the area of protection afforded by copyright.”¹⁷⁷ In the end, the court concluded that Hammett had reserved some rights to the character and that the overall purpose of copyright to “promote the useful arts” would be frustrated if an author sold the

169. *Id.*

170. *See id.* at 121 (describing a suit against a motion picture producer for producing a picture where the story line allegedly resembled a play written by the plaintiff). The court held the picture was too unlike like the original play to constitute a copyright violation. *Id.* at 120.

171. *See* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 453 (1986) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2005)) (analyzing how many courts have cited the *Nichols* decision to refuse copyright protection, while others have used *Nichols* to find copyright violations without good reason, and have thereby turned a test which is meant to limit copyright protection into a test which increases protection).

172. *See* Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

173. *See id.* at 946.

174. *See id.* at 949.

175. *See id.*

176. *Id.* at 950.

177. *Id.*

rights to her individual characters every time she licensed the work.¹⁷⁸ According to Kurtz, the test the Ninth Circuit outlined was actually very restrictive and had the theoretical result of excluding almost every character from copyright protection based on the narrowness of the test.¹⁷⁹

Yet its narrowness has given rise to a host of confusing decisions. Although the Ninth Circuit had similar intentions to the *Nichols* Court of protecting only well-developed, creative characters as commodities, the resulting test was so vague that it left many authors and creators arguing that they had acquired copyright protection over even the thinnest of characters.¹⁸⁰ The result became a system characterized by inconsistency and overprotection,¹⁸¹ which contributed to a huge expansion of private ordering over the protection of characters, a problem further intensified by later Ninth Circuit decisions that tended to extend copyright protection to subjective character elements, like their “look and feel.”¹⁸²

The resulting standard for character protection has tended to overlook the distinction between the legal standards for infringement and the question of copyrightability itself.¹⁸³ Nor does character appropriation fit neatly into either of the two classifications of substantial similarity created by Professor Nimmer: “comprehensive nonliteral similarity,” which involves duplicating the fundamental essence or structure of a work, like the plot or structure of a work, and “fragmented literal similarity,” which involves the existence of some literal similarity between the two works, like lines of dialogue or

178. See *id.* (explaining that “The restriction argued for is unreasonable, and would effect the very opposite of the statute’s purpose which is to encourage the production of the arts.”)

179. See Kurtz, *supra* note 171, at 453-54 (noting that the test became more restrictive because, as an example, Sherlock Holmes and Tarzan would be protected under *Nichols*, even if these characters did not constitute the story being told, as the Ninth Circuit would require).

180. See *id.* at 454-55 (explaining that other jurisdictions, unsure of how to apply the Ninth Circuit’s test set forth in *Columbia Broad Sys.*, have either distorted or ignored it).

181. See *id.* at 456-57 (noting that in *Warner Bros. v. Film Ventures Int’l*, 403 F. Supp. 522 (C.D. Cal. 1975), involving a character in a film that was similar to the demonic girl in *The Exorcist* was not an infringement, but in *Edgar Rice Burroughs, Inc. v. Man*, No. 76-36121976, WL 20994 (C.D. Cal. Dec. 20, 1976), an X-rated film featuring the characters “Tarz,” “Jane,” and “Cheeta,” was found to be an infringement on Burroughs rights).

182. See *Sid & Mary Krofft Television Prod. v. McDonald’s Corp.*, 563 F.2d 1157, 1165 (9th Cir. 1977) (analyzing the benefits of an extrinsic versus an intrinsic test and deciding that an intrinsic test, which involves more than copying an idea but rather an “unlawful appropriation,” is most appropriate).

183. See Kurtz, *supra* note 171, at 445-46 (illustrating cases where courts have used different standards to determine what characteristics of a character are protected under copyright).

particular sections of a copyrighted work.¹⁸⁴

Since the fan fiction writer uses the name, appearance, or personality of a particular character, some degree of copying is clear.¹⁸⁵ At the same time, it becomes incumbent on a court to determine whether the defendant's work is substantially similar and amounts to infringement or whether other defenses weigh in favor of the appropriation. Here is where a host of confusion can result. In an early case, the Second Circuit found that the cartoon character "Wonderman" infringed upon the copyright in "Superman" after examining the similarities between the two characters. However, as Kurtz points out, the court never made clear what aspect of "Superman" was actually infringed—his appearance, abilities and powers, or specific incidents within the cartoon.¹⁸⁶ In another more recent case, an advertising agency was sued for copyright infringement based on a commercial advertisement that they developed to sell a new car, the Honda Del Sol.¹⁸⁷ The concept for the ad involved a villain who leaps from a high-tech helicopter onto the roof of the automobile, which is driven by a well-dressed male with a female passenger.¹⁸⁸ Based on the similarities between the theme of the advertisement and the character of "James Bond," the court found evidence of infringement.¹⁸⁹

On the other hand, clear evidence of differences between the two

184. See *id.* at 442 (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A] (2005)).

185. See *id.* at 444 (explaining that even when copying is clear a distinction must be drawn between a character that is substantially similar to a copyrighted work and one that is just reminiscent of a character in a copyrighted work).

186. See *Detective Comics, Inc., v. Bruins Publ'ns, Inc.*, 111 F.2d 432, 433-34 (2d Cir. 1940) (finding that the character "Wonderman" was substantially similar to the character "Superman" because both characters concealed their strength by wearing ordinary clothes, both wore a skintight costumes under these clothes, both were "champions of the oppressed," each ran off into the night, crushed a gun in their hands, were impenetrable to gunshots, leapt over buildings or from building to building, had the strength to open a steel door, battled evil and injustice, and are described as "the strongest man in the world"); Kurtz, *supra* note 171, at 445-46 (adding that in another *Superman* case Judge Learned Hand interpreted the *Detective Comics* decision narrowly, arguing that the copyright was restricted to the "specific exploits of Superman as each picture portrayed them").

187. See *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1291-92 (C.D. Cal. 1995) (describing plaintiffs who had the rights to sixteen *James Bond* films and claimed the scene in a Honda commercial constituted a copyright infringement of these films).

188. See *id.* at 1291 (noting the plaintiffs contention that the defendants asked talent agencies for a "James Bond type" to star in their commercial and therefore intended to copy their character).

189. See *id.* at 1299 (finding that the defendants had access to *James Bond* films, the commercial had substantial similarities to the films, that an average viewer of the commercial would be reminded of the films under the intrinsic test, and that there was not substantial evidence to show that the idea for the commercial was "independently created").

characters can be determinative in successfully defending claims of infringement. In a case involving the animated character the "Pink Panther," a court held that the copyright extended "not merely to the physical appearance of the animated figure, but also to the manner in which it moves, acts, and portrays a combination of human and feline characteristics."¹⁹⁰ However, the court declined to find that the defendant's cat, an animated cougar used to sell Lincoln-Mercury cars, bore an actionable degree of similarity between the two cats largely due to the differences in appearance, manner, and movement.¹⁹¹ Similar conclusions were reached regarding the comparison between "Superman" and the protagonist on the television show, "The Greatest American Hero," where the main character was depicted as a messy, under confident, and often inept superhero, in stark contrast to the confident, classy, and skillful "Superman."¹⁹² Other cases denying protection also may find that the character does not constitute the story being told; arguments in this context have extended to characters from the movie *The Exorcist*¹⁹³ and the television show "The A-Team."¹⁹⁴

Despite these examples, there is still a significant degree of protection offered to fictional characters and, as a result, a large degree of vulnerability facing the legal status of fan fiction. Some copyright owners will continue to and have successfully argued in the past that a fan's use of a fictional character is an unauthorized derivative work. The case for infringement becomes much clearer in fan fiction because the character's names and visual styles are often appropriated to ensure a sense of authenticity between the fan fiction

190. See *United Artists Corp., v. Ford Motor Co.*, 483 F. Supp. 89, 91 (S.D.N.Y. 1980); see also Kurtz, *supra* note 171, at 448 (noting that the court focused on the character's personality as well as its appearance in determining whether or not the copyright was infringed).

191. See *United Artists*, 483 F. Supp. at 95 (finding that an ordinary viewer of the television commercials would not find the cats to be similar).

192. See *Warner Bros., Inc. v. Am. Broad. Co.*, 654 F.2d 204, 209 (2d Cir. 1981) (reasoning that performing "feats of miraculous strength" is too broad a theme to merit copyright protection).

193. See *Warner Bros., Inc. v. Hoya Prods., Inc.*, 403 F. Supp. 522, 523-25 (C.D. Cal. 1975) (finding that the possessed, pregnant women in the film *Beyond the Door* did not improperly resemble the possessed little girl in *The Exorcist*). The court also held that the use of cinematic effects such as flickering lights, haunted-house type noises, flying bodies and objects in a room, levitation, and the horrific alteration of human features have been used for several years in varying plays and films. *Id.* at 525. The use of such cinematic effects in the film *Beyond the Door* does not create an effect substantially similar to the effects in *The Exorcist* and therefore does not constitute a copyright infringement. *Id.* at 525.

194. See *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1451-53 (9th Cir. 1988) (holding that the television show *Cargo* was not substantially similar to the television show the *A-Team* because the idea to create an action-adventure television series where Vietnam veterans are portrayed positively is not protectable).

piece and the original work. This is so even when the difference between the two works is clear in terms of sponsorship and authorship. Consider the case of *Anderson v. Stallone*, which involved Timothy Anderson, an individual who prepared a prospective script treatment for a planned *Rocky IV* sequel.¹⁹⁵ Despite preparing a preliminary outline for the sequel and circulating it to representatives from MGM Entertainment, a formal deal was never reached.¹⁹⁶ When Anderson viewed Sylvester Stallone, the writer and star of the original *Rocky*, on national television discussing his plans for a sequel, he filed suit for copyright infringement after the sequel's release on the grounds that Stallone and MGM had appropriated his treatment.¹⁹⁷ In its opinion, the court found a high level of protection for the "Rocky" character on the basis of its high degree of delineation and character development.¹⁹⁸ In fact, the court found that it was Anderson who had created an unauthorized derivative work based on his wholesale appropriation of the characters.¹⁹⁹ Last, and perhaps most importantly, the court found that Anderson was not entitled to any degree of protection for the new original work that he created in addition to the preexisting character and protected plot.²⁰⁰ The court concluded that the standards of copyrightability could not be used to "arm an infringer," thereby limiting the protection for derivative works.²⁰¹

As some commentators have noted, *Anderson* creates a substantial dilemma for individuals, like fan fiction writers or sequel authors, who may seek to draw upon preexisting copyrighted works in their own

195. No. 87-0592 WDKGX, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989).

196. *See id.*

197. *See id.*

198. *See id.* at *7 (illustrating the complex emotional characteristics of Stallone's characters, the relational developments between the characters, the fact that the character Rocky is also the title of the three previous movies and central to the movies, and that the character Rocky has become linked with certain physical traits and manneurisms).

199. *See id.* at *8.

200. *See id.* at *10-11 (articulating that Stallone had not infringed on Anderson's right but rather that Anderson had infringed on Stallone's copyright); *see also* 17 U.S.C. § 103 (a) (2005) (stating that the subject matter of copyrighted works includes compilations and derivative works, but "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully").

201. *See Anderson*, 1989 WL 206431, at *10-11 (noting House reports and Nimmer's treatise to show that § 103 (a) was not meant to pertain to derivative works); *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.06 (2005) (discussing the dilemma secondary authors face when they seek protection for their creative works but are classified under the law as infringers undeserving of protection).

creative endeavors.²⁰² Such authors have little incentive to create or to circulate their work for commercial reasons because *Anderson* creates a substantial likelihood that an original copyright holder can use the material produced by a prospective scriptwriter without attribution, on the grounds that the work constitutes an unauthorized derivative work.²⁰³ Not only can the original copyright holder “block” any improvements or changes to a protected work in a sequel or work of fan fiction by denying copyrightability, it also creates some risk that the holder may unjustly enrich herself of the new work without fear of legal retribution under copyright law.²⁰⁴

These cases taken together suggest that fan fiction occupies a particularly vulnerable area within cyberspace. Because it draws upon the unauthorized use of copyrighted characters, it often runs the risk of igniting tensions between fans and content owners in the process. Consequently, one might argue that fan fiction falls within a “grey area” of both copyright and trademark. While it utilizes copyrighted characters without authorization, it also adds a host of new, creative elements to the original. One slash writer argues:

A lot of people would argue that we're not creative because we build on someone else's universe rather than coming up with our own. However, I find that fandom can be extremely creative because we have the ability to keep changing our characters and giving them new life over and over. We can kill and resurrect them as often as we like. . . . We can give them an infinite, always-changing life rather than the single life of their original creation. We have given ourselves license to do whatever we want and it's very liberating.²⁰⁵

Given the powerful role of creativity in fan fiction, there is a powerful argument to be made on the basis of fair use considerations. Certainly, each of the following four factors analyzed in fair use cases weigh strongly on its behalf: the purpose and character of the use (whether it is for profit or noncommercial reasons), the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the

202. See Matthew A. Kaplan, Note, *Rosencrantz and Guildenstern are Dead, but are They Copyrightable?: Protection of Literary Characters with Respect to Secondary Works*, 30 RUTGERS L.J. 817, 830 (1999) (advocating the development of a balance between protecting the original author through copyrights but also permitting a secondary author to invent new stories based on the original characters).

203. See *id.* at 830-31 (noting that this decision is detrimental to the entertainment industry which relies on secondary authors to produce sequels and also has the unwanted effect of limiting the exposure which secondary author's work receives).

204. See *id.* at 831.

205. Green et al., *supra* note 88, at 35 (quoting Kim Bannister, *Desert Blooms in 2 STRANGE BEDFELLOWS* (Aug. 1993)).

use on the potential market for or value of the copyrighted work.²⁰⁶ Even though it has a large base of demand, fan fiction is usually a non-commercial enterprise and writers rarely attempt to profit from its creation and circulation.²⁰⁷

I would argue that slash represents a subset of fan fiction that highlights a sort of paradox. At the same time that it may be seen as more vulnerable due to its "queering" of mainstream characters (and its erotic treatments of their relationships), it also establishes a stronger claim in favor of fair use on such grounds. As many of the cases I have mentioned demonstrate, there may be strong non-economic reasons why a copyright owner might choose to utilize copyright protections as a vehicle in silencing alternative narratives of characters that may be offensive to some. Justin Hughes has written a very powerful account of this position, arguing that aggressive recoding of cultural products may implicate both the personality interests of authors and the audience's own interests in a stable cultural object.²⁰⁸

While I do not disagree with his descriptive observations, I would posit that the interest of cultural stability has traditionally tended to

206. See 17 U.S.C. § 107 (2005) (detailing the four factors courts are to consider in determining whether the use made of a copyrighted work is fair use).

207. See McCardle, *supra* note 77, at 451 (explaining that most fan fiction writers post their work on the Internet, allowing readers free access).

208. See Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L. J. 81, 85 (1998) (exploring the "personality" interests that are present in a piece of intellectual property); Hughes, *Recoding*, *supra* note 8, at 926 (comparing the benefits to non-owners when owner control is used to keep a cultural object stable to the public benefit gained when owners of private buildings maintain them properly). Other writers have explored recoding from various perspectives. See, e.g., Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights - Comment on Robert H. Rotstein*, 68 CHI.-KENT L. REV. 805, 826 (1993) (exploring an approach to copyright in which the "texts" are depropertized in order to give them a more "public" character). For other discussions of recoding and authorial control, see generally Keith Aoki, *Surveying Law and Borders: (Intellectual) Property and Sovereignty: Notes towards a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); James Boyle, *A Theory of Law Information; Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996); Coombe, *Objects of Property*, *supra* note 13; Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1991-1992); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 (1991); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literature Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 149, (1981); Madow, *supra* note 8; Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993); Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1996); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 277 (1992).

discount the development of a diverse cultural marketplace of ideas, particularly with respect to ideas that are outside of mainstream beliefs and practices. Consider that a significant percentage of case law surrounding appropriation of characters usually involves some association that may discolor or tarnish an otherwise wholesome image of a character in creating some sort of alternative commentary.²⁰⁹ The well-known case of *Walt Disney Productions v. Air Pirates* is a good example of this trend, which found trademark infringement for “an underground comic book which had placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings.”²¹⁰ Instead, the comic book depicted these characters as “active members of a free thinking, promiscuous, drug ingesting counterculture,”²¹¹ and the court accordingly found that “[b]y copying the images in their entirety, defendants took more than what was necessary to place firmly in the reader’s mind the parodied work and those specific attributes that are to be satirized.”²¹²

Despite the expansion of copyright law into this uncharted area, editorializing arguments against recoding, particularly as they apply to slash, only serve to advance rather than counteract the economic and expressive arguments in favor of fair use. In an influential article, Professor Wendy Gordon postulated that fair use considerations should be applied in cases of “market failure,” that is to cases where parties fail to reach a market transaction.²¹³ As the Supreme Court itself recognized in *Campbell v. Acuff-Rose Music*, “there is no

209. See Hughes, *Recoding*, *supra* note 8, at 983 (arguing that the factor that most affects whether a parody will be found to be a non-infringing fair use is whether or not the parody is pornographic).

210. See 581 F.2d 751, 753 (9th Cir. 1978) (quoting Kevin W. Wheelright, Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F.L. REV. 564, 571, 582 (1976)).

211. *Id.* at 753.

212. *Id.* at 758.

213. See Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982) (arguing that the market value of a resource does always reflect the net social benefits that will result from the transfer). For related discussion of these points in the context of parody, see generally Robert P. Merges, *Are you Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305 (1993) (discussing *Campbell v. Acuff-Rose* and the economic view of copyright); Richard Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992) (arguing that copyright exemption for parodies should be very narrow); Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and Campbell v. Acuff-Rose Music*, 69 S. CAL. L. REV. 767 (1995-96) (analyzing the impact of *Campbell v. Acuff-Rose* in light of economic, fair use, and copyright theory); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991) (discussing the difficulties that arise when authors are unwilling to sell their parody rights).

protectible derivative market for criticism," since most copyright owners would opt against licensing their works for such purposes.²¹⁴ Given the potentially prohibitive presence of non-economic considerations, like a predisposition against criticism or debased commentary, it is unlikely that a copyright holder will be willing to enter into a market transaction with a parodist. As a result, fair use protections operate to ensure that the law supplies a solution that favors dissemination, even where the refusal to license is based on non-economic motives.²¹⁵

At the same time, a copyright owner might argue that a work of fan fiction interferes with the market for the original work or any derivative markets that the original creator might plan to enter or license. In one case, *Castle Rock Entertainment v. Carol Publishing Group*, a court found that the publication of an unauthorized book of trivia based on the television show "Seinfeld" constituted an infringing derivative work because of the realistic possibility that the creator might choose to enter into the new market.²¹⁶ Other cases involving similar fan books have reached the same conclusion.²¹⁷

Yet such cases often overlook a key distinction between market substitution and market complementarity, which is that the fan-related products are meant to enhance the demand for the original, rather than compete with it. Slash, in particular, does not operate as a market substitute precisely because of its transgressive nature and it is highly unlikely that any mainstream creator would choose to market their characters in same-sex relationships.²¹⁸ The presence of stronger claims of product differentiation, at the very least, suggests that it does not harm the market for the original, but, if anything, may even enhance it.²¹⁹ This point was aptly recognized by Judge Posner

214. 510 U.S. 569, 592 (1994).

215. See Merges, *supra* note 213, at 310 (adding that copyright law's preference for dissemination is too strong to accept non-economic motives for refusing to make a transaction).

216. See 150 F.3d 132, 145 (2d Cir. 1998) (explaining that, unlike parody and other forms of criticism, the trivia book fills a market niche that Castle Rock would want to develop).

217. See, e.g., *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998) (involving the book *The Joy of Trek: How to Enhance Your Relations with a Star Trek Fan*); *Twin Peaks Prods., Inc. v. Publ'n Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993) (involving the book *Welcome to Twin Peaks* that is based on television show of the same name).

218. See Judith Gran, *Fan Fiction and Copyright*, <http://www.alternateuniverses.com/judygran/copyright.html> (last visited July 26, 2006) (explaining how unlikely it is that Paramount would want to market Star Trek in the slash business).

219. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992) (finding a computer program that allowed the alteration of character elements to be fair use because it enhanced the market for the original).

in a case that involved the development of a collector's guide for the copyrighted "Beanie Babies" products.²²⁰ In that case, the court squarely recognized the difference between products (such as collector's guides) that were complementary to the original product and those that attempted to substitute for its market in derivative works.²²¹ Given the possible similarities between a collector's guide that discusses character details and attributes and fan fiction, one could argue that these additional markets would not interfere with the demand for the original.

Aside from these economic considerations, there are also strong expressive considerations that operate in favor of recognizing slash as a clearly protected area of fair use. Some evidence suggests that the trend towards silencing such narratives is shifting, a factor which creates significant degrees of uncertainty within the world of fan fiction. In one recent case involving a book entitled *The Wind Done Gone*, a rewriting of the book *Gone With the Wind* from the perspective of a slave, the Eleventh Circuit found that a work is a parody if it aims to comment upon or criticize prior work by "appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic work."²²² Because the new work added substantial elements to the previous work thereby transforming it, the court held that the work was a protected parody even though it appropriated numerous characters, settings, and plot twists from the original work.²²³ "The fact that Randall chose to convey her criticisms of [*Gone With the Wind*] through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive [*The Wind Done Gone*] of fair-use protection," the court observed before proceeding to an

220. See *Ty, Inc. v. Publ'n, Int'l, Ltd.*, 292 F.3d 512, 520 (7th Cir. 2002) (arguing that the publicity created by the collector's guide enticed children to buy more "Beanie Babies").

221. See *id.* at 25 (distinguishing the "Beanie Babies" collector's guide from *The Seinfeld Aptitude Test*).

222. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268-69 (11th Cir. 2001) (choosing to define parody more broadly than just a comedic ridicule of the original work); see also Michael A. Einhorn, *Miss Scarlett's License Done Gone! Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 605 (2002) (explaining that the *Suntrust* court emphasized *The Wind Done Gone's* criticism of the depiction of slavery in *Gone with the Wind* in determining that it was a parody).

223. See *Suntrust Bank*, 268 F.3d at 1277 (holding that *The Wind Done Gone* is not a general commentary on the Civil War, but rather a specific criticism of *Gone With the Wind*). Interestingly, a Dutch court reached a different conclusion in the case of an author who wrote a work that was very similar to works involving Harry Potter. See Ilanah Simon, *Parodies: A Touch of Magic*, 26(4) E.I.P.R. 185, 186 (2004) (holding that the purpose of the parody is to make the original work a subject of humor).

examination of each factor of the fair use defense.²²⁴

Because the work attempted to explode the myth of the genteel, romantic, idealized portrait of the original work and instead to show the influence of undercurrents of racism, homophobia, and militarism within Southern culture, the court found that it represented far more than an unauthorized appropriation.²²⁵ In fact, as one footnote expressed, the queering of certain key characters in the new work only served to further demonstrate the parodic intent.

Randall's parodic intent vis-à-vis Ashley [a main character] becomes manifest when the two works are read side-by-side. Mitchell has Gerald describe Ashley Wilkes: 'The Wilkes are different from any of our neighbors—different from any family I ever knew. They are queer folk, and it's best that they marry their cousins and keep their queerness to themselves. . . . And when I say queer, it's not crazy I'm meaning. . . there's no understanding him at all. . . tell me true, do you understand his folderol about books and poetry and music and oil paintings and such foolishness?' GWTW at 34. Later, Mitchell describes how "Scarlett turned her prettiest smile on Ashley, but for some reason he was not looking at her. He was looking at Charles. . . ." GWTW at 113. This particular element of Randall's parody takes on special relevance in the market-harm analysis of the case, because it is evident from the record evidence that SunTrust makes a practice of requiring authors of its licensed derivatives to make no references to homosexuality.²²⁶

In that case, the court clearly observed that the above discussions of sexuality demonstrated an explicit desire to comment upon and critique the original—the fact that the heirs would never license such discussions could not illustrate a better rationale for the application of fair use protections.

As this case suggests, far from silencing these critical narratives, a few courts actually espouse a greater degree of protection when the discussion centers on a critique of sexuality and gender norms. The Ninth Circuit also established powerful parameters for this right in the case of the song "Barbie Girl" that attempted to personify a speaking Barbie doll as a living, breathing character who only liked to party and have fun.²²⁷ In that case, the court observed that a trademark comprises a limited property right that "cannot be used to allow trademark owners to eviscerate all discussion of their marks they

224. *Suntrust Bank*, 268 F.3d at 1269.

225. *See id.* at 1270.

226. *Id.* at 1271 n.26.

227. *See Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp.2d 1120 (C.D. Cal. 1998) (holding the song did not violate the trademark because it was a parody of Barbie and the culture she represented and was protected speech under the First Amendment).

may find annoying or offensive.”²²⁸ Another recent case, also involving Barbie, this time in pictorial images that displayed the Barbie doll in a host of compromising positions, also reached similar conclusions with respect to copyright law.²²⁹ In that case, as in the prior one, the Ninth Circuit aptly recognized that certain marks can transcend their original purpose as a source of identification and instead become part of our common discourse.²³⁰ When this happens, a mark attains such a high degree of cultural significance that the First Amendment takes on a very powerful role.²³¹ Given their existences as parodies that critique gender, the court held that there was little risk of market substitution.²³² Because the use of the dolls did not convey any level of sponsorship, the court found that the pictures constituted protected fair use.²³³ Central to its conclusion was a critical balancing test that required courts to apply trademark protections to artistic works “*only* where the public interest in avoiding consumer confusion *outweighs* the public interest in free expression.”²³⁴ Given the strong speech implications of the works, the court opted to allow their protection.²³⁵

Despite the powerful implications for fan fiction, one writer argues that the import may be limited since most fan fiction writers do not aim to criticize or satirize the original work but merely add to it in new and different ways.²³⁶ This often means that copyright owners may attempt to draw lines between what is allowed and what is prohibited. For example, according to Henry Jenkins, Lucasfilm, while claiming to tolerate fan fiction, actively discourages the production of slash fan fiction in particular.²³⁷ It does so by

228. *Id.* at 1141.

229. *See* Mattel, Inc., v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003) (finding that photos of a nude Barbie being attacked by appliances did not amount to copyright infringement).

230. *See id.* at 807 (explaining that Barbie has become so integral to our culture and vocabulary that it has left the bounds of trademark law).

231. *See id.* (adding that when First Amendment protections arise, the trademark owner cannot control public discourse every time its mark is mentioned with a meaning beyond its source-identifying function).

232. *See id.* at 805 (explaining that Mattel is not likely to commission an artist to create a work that is critical of Barbie).

233. *See id.* at 807 (adding that it is unlikely that anyone would believe Mattel had sponsored the pictures simply because the name Barbie was used).

234. *See id.* at 806 (articulating the purpose of trademark law as protecting trademark owners from false perception that they sponsor or are associated with a product).

235. *See id.* at 812.

236. *See* McCardle, *supra* note 77, at 456 (adding that the *Suntrust* decision might aid only the few fan fiction writers whose purpose is to satirize the original work).

237. *See* TheForce.Net, CNet Media Expert Talks to TFN, May 18, 2005, http://www.theforce.net/fanfiction/story/CNet_Media_Expert_talks_to_TFN_92570.asp

apparently distinguishing between “parodies” (which it permits on its fan fiction site) and “dramatic expansions of the ‘Star Wars’ universe” (which it apparently prohibits).²³⁸ Yet the lines are so blurred between parody and other forms of appropriative expression that the copyright owner may claim that something is prohibited, when in fact it may fall within fair use protections entirely. Consider Tushnet on this point:

[I]t is difficult to draw clear lines between parody and other types of transformative use, including political protest. For example, in response to Fox Broadcasting’s recent action against unauthorized Millennium Web sites, one author posted a story, Fahrenheit 1013, that used the X-Files characters and settings to posit a nightmare world in which all forms of expression, including children’s names, are owned by corporate entities, making human creativity and communication impossible. Parody? Political statement? Neither? When does use of a ‘canon’ turn from respect for the form to parody?²³⁹

Tushnet’s points are especially apt when we consider that the narratives of slash often involve a complex intersection of political commentary, parody, and erotic fascination. In this sense, slash, like other types of amateur creations, involves real, actual labor that is often missed by those who fail to recognize markets that operate outside of commodities. These worlds are the very essence of creativity and yet they are often the first to be penalized within the growing specter of copyright control. As one author observes, the process of fan writing is both re-creative and collaborative at the same time and it involves a process of trial and error.²⁴⁰ No one is meant or expected to “get it right” or to “repair the damage” of mass commercialization, but rather “as fan writers work together, rewriting the source products and rewriting each other’s reconfigurations, they begin to write out a story that is worth having.”²⁴¹

(discussing Lucasfilm and its attempts to accommodate and also contain fan fiction); TheForce.Net, Editorial: CNet Article Just Plain Wrong, May 2, 2005, http://www.theforce.net/fanfiction/story/Editorial_CNet_Article_Just_Plain_Wrong.91884.asp [hereinafter TheForce.Net, *Editorial*] (arguing that slash fan fiction is discouraged, but not for gender reasons).

238. See TheForce.Net, *Editorial*, *supra* note 237 (clarifying the restrictions set up by Lucasfilm, which include “you can only use these sounds we provide you, you can’t use copyrighted materials and appropriate or recontextualize it, you can do parodies, but you can’t do dramatic expansions of the ‘Star Wars’ universe”).

239. Tushnet, *Legal Fictions*, *supra* note 77, at 668. See generally Bruce Keller and Rebecca Tushnet, *Even More Parodic than The Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979 (2004) (discussing the effects of the *Campbell* case and other opinions on copyright and trademark law).

240. See Kustritz, *supra* note 81, at 383 (explaining that the process of writing slash fan fiction is with an aim to create relationships based on equality).

241. *Id.*

B. Private Ordering and Copyright Enforcement

Copyright's formalities, for all of their power to silence, have also served an important function. They have yielded entire systems of informal control that are built largely on social norms and disclaimers within the world of fan fiction. In this sense, as I show below, copyright's informal area of control has still enabled the development of fan fiction, albeit one that operates purely at the permission of the copyright holder. The formal area is propertied, protected; the latter is performative, informal in nature. These systems operate as webs that tie together various communities within the world of fan fiction and often underlie the interactivity that characterizes cyberspace in general.

Given the uncertainty over the legal status of fan fiction, systems of private ordering govern in cyberspace—slash fan writers have extraordinarily well-developed systems of customs, rules, and expectations with respect to the writing of narratives and character development. In turn, copyright holders also tend to follow another set of rules that predictably might overstate their realm of control over their characters. The market for characters has changed in recent years as well, leading to a much greater level of attention paid to the marketing and trademarking of characters as actual, tangible commodities.²⁴² Along these lines, copyright, trademark, and the right of publicity often blend together, raising a host of converging concerns against the tarnishment, appropriation, and dilution of a single character.

Thankfully, most copyright owners tend not to get involved with fan fiction unless a narrative involves graphic sexual content, in order to avoid "tarnishment" of the original image. However, slash fan fiction is considered to be especially transgressive because of its sexualization of mainstream characters and because its story lines often involve "recoding" these characters as gay, bisexual, or involved in a same-sex relationship with another character. In these instances, it is hard to separate out whether the objectionable content is considered to be problematic because of its graphic sexual content or because of the same-sex narrative that it offers. Whether the objection is due to a desire to "purify" characters from sexualized appropriations or to save them from a presumed "gay agenda," the result is clear—a potential chilling of expressive, creative activity that squarely belongs within the audience's control.

Although many entertainment corporations usually tend to leave

242. See Michael Todd Helfand, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional, Literary, and Pictorial Characters*, 44 STAN. L. REV. 623 (1992).

fan fiction alone, a few have attempted to shut down unauthorized uses of their characters on the Web.²⁴³ At the same time, such outright policing of copyrighted and trademarked characters masks the prominent role that appropriation has played in the construction of historically significant works of art. Despite this long tradition of appropriation, intellectual property law has been used to control such creations. In June of 1977, Paramount, which held the copyrights to *Star Trek*, sent a cease-and-desist letter to two women who had written and published a *Star Trek* fanzine.²⁴⁴ Although Paramount eventually dropped the case after they realized the zine was not a professional publication, it marked a watershed moment because it was the first time that intellectual property law had been used as a tool to control the development of fan fiction.²⁴⁵ Just four years later, the head of the Official Star Wars Fan Club sent a similar letter to the producers of an adult fanzine on *Star Wars*, arguing that its content violated an informal policy of the copyright holder to resist from governing fanzines as long as they were not pornographic in nature.²⁴⁶

More recently, there has been a much greater degree of fan fiction surveillance by copyright holders, which can and has given rise to a higher incidence of policing.²⁴⁷ For example, Jenkins described an incident where an executive producer from "Babylon 5" came to speak at his science fiction class at MIT.²⁴⁸ When a student asked him about fans, he paused and replied, "You mean, copyright infringers,"

243. See Tushnet, *Legal Fictions*, *supra* note 77, at 651 (explaining that technology has assisted in this phenomenon, allowing for the easy reproduction of copyrighted documents on the Internet); see also Nancy Basile, *Fox vs. 'The Simpsons' Fans*, ABOUT.COM, http://animatedtv.about.com/od/foxnetwork/i/foxfans_p.htm (last visited July 26, 2006) (detailing Fox's threats against both "The Simpsons" and "Millennium" fan sites); Nancy Basile, *"The Simpsons" Fans Get Organized*, ABOUT.COM, http://animatedtv.about.com/od/foxnetwork/a/greatblackout_p.htm (detailing a plan for all "The Simpsons" web sites to shut down in a mass protest against Fox) (last visited July 26, 2006); Lynn Burke, *Fox wants Buffy Fan Sites Slain*, WIRED NEWS, Mar. 2, 2000, <http://www.wired.com/news/business/0,1367,34563,00.html> (explaining that Fox sent cease-and-desist orders to a number of unofficial websites dedicated to *Buffy the Vampire Slayer*); ChillingEffects.org, Cease and Desist Notices: Fan Fiction, <http://www.chillingeffects.org/fanfic/notice.cgi?print=yes> (last visited July 26, 2006) (listing a host of cease-and-desist examples against fan sites).

244. See McCardle, *supra* note 77, at 441.

245. See *id.*

246. See *id.* (adding that the publishers of the fanzine ceased publication as a result).

247. For more on this phenomenon and its privacy implications, see generally Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297 (2003) (explaining that piracy surveillance circumvents First Amendment and privacy considerations).

248. See Henry Jenkins, *Digital Land Grab*, TECH. REV., March/April 2000, at 103 (adding that most discussions of copyright issues on the Internet are concerned with corporate worries about infringement).

which resulted in nervous laughter from the class and, as Jenkins writes, “mutual misunderstanding.”²⁴⁹ In the mid-1990s, Fox Television decided to enforce its copyrights of a variety of shows after it started to see a large amount of fan activity regarding them.²⁵⁰ In 1995, it began issuing cease-and-desist letters against fan sites of the shows “Millennium” and “The Simpsons,” warning them of criminal and civil penalties if they contained infringing material.²⁵¹ In other commentary, Fox asserted that it did not want to alienate its fans or “shut down legitimate fan sites, but it wanted to retain the ‘creative integrity’ of its shows” and was concerned about turning characters into parodies or tarnishing their image in pornographic narratives.²⁵² In addition, Fox explained that it was particularly concerned about the increasing prevalence of copyrighted images on these sites without copyright notices and worried that its own licensing agreements with various guild members might be affected if their work was used on non-legitimate sites.²⁵³

Almost immediately, the letters generated a substantial chilling effect. Out of the forty-three sites devoted to “The Simpsons” who received such letters, twenty-seven shut down and seventeen agreed to remove copyrighted images from the site.²⁵⁴ Others refused to relent and claimed that Fox’s actions were an unjust exercise of their copyrights to squelch freedom of expression.²⁵⁵ Still others initiated massive online campaigns against Fox, including inundating them with protest letters, web blackouts, and protest sites against Fox’s activity.²⁵⁶ Eventually Fox decided to halt its campaign against most sites, deciding that the existence of disclaimers and a legal notice would suffice and focusing on the most egregious infringers, those who used video clips.²⁵⁷ The same degree of limited tolerance is

249. *Id.*

250. *See* Ogbu, *supra* note 77, at 303 (2003) (adding that the website for the show “Millennium” was created before the show even premiered).

251. *See id.* at 303 (adding that the letter ironically asserted that Fox was supportive of its fans whenever possible).

252. *See id.* at 302 (noting that often the shows’ creators did not agree with the studio’s actions in shutting down fan sites).

253. *See id.* (adding that Fox was also concerned that the fan sites would take traffic away from the official studio site).

254. *See id.* at 303-304 (explaining that many fan site creators were willing to remove the objectionable material because they were unaware that they had been infringing on the copyright).

255. *See id.* at 304-05 (giving example of these commentaries and noting that the fans believed the level of control Fox was asserting was unreasonable).

256. *See id.* at 305 (stating that some fans were particularly angry because they believed the sites were providing Fox with free publicity).

257. *See id.* at 307 (noting that the cause behind Fox’s change in policy is unclear).

shared by the owners of the copyrights to *Harry Potter* and *Star Trek*, both of whom have espoused a degree of permissiveness in allowing such sites to flourish.²⁵⁸ For example, *Star Trek*'s creator Gene Roddenberry has noted that he has no objection to plays that are similar or even identical to *Star Trek* as long as they give appropriate credit to the original source material.²⁵⁹ *Star Trek*'s owner Paramount has also taken this view and has commented that it is familiar with several fanzines and finds them to be a "fair use" that they only hope to encourage.²⁶⁰

Most fan fiction web sites contain a detailed disclaimer that acknowledges that the fan fiction writer does not own the copyright to the characters used and that the author is receiving no financial benefit from the work.²⁶¹ Tushnet has argued that disclaimers represent a powerful means for copyright holders to ensure the integrity of their creations, while allowing for creativity and discussion to flourish regarding such works.²⁶² They allow fans to show their allegiance to specific characters and texts and acknowledge that they are not writing the "canon" but borrowing from it.²⁶³ She wrote, "[c]opyright disclaimers are manifestations of democracy in action; articulating norms about justice in the shadow of formal law."²⁶⁴ For example, one disclaimer on a site devoted to stories of *Xena, Warrior Princess* reads:

"The following story is classified as fan fiction. The characters of Xena, Gabrielle and others who have appeared in the series, *Xena, Warrior Princess*, are the property of MCA/Universal Television and Renaissance Pictures. I only borrowed them."²⁶⁵ However, a recent action by Lucasfilm suggests an interesting variance regarding the formal divide between the "canon" and fan fiction. It offered fans free pages on its starwars.com site to post their stories, songs,

258. See, e.g., Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC NEWS, May 27, 2004, <http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm>.

259. See Tushnet, *Legal Fictions*, *supra* note 77, at 672-73, (quoting JOAN MARIE VERBA, *BOLDLY WRITING: A TREKKER FAN AND ZINE HISTORY, 1967-1987* 7 (1996)) (referring to the use of *Star Trek* for non-profit plays).

260. See *id.* at 673 (adding that Paramount ignores fan publications and only takes legal action against commercial products).

261. See McCardle, *supra* note 77, at 451 (explaining that the purpose of fan fiction writing is to satisfy the author's desires).

262. See Tushnet, *Legal Fictions*, *supra* note 77, at 669 (adding that disclaimers enhance the market for official texts by producing interest in them).

263. See *id.* at 680 (explaining that one of the principle purposes behind disclaimers is to ensure that fan fiction cannot compete with or be mistaken for the original).

264. *Id.* at 683.

265. McCardle, *supra* note 77, at 452.

messages, and essays regarding the work.²⁶⁶ However, the fine print stated that Lucasfilm retained the copyrights to anything placed on the sites—borrowed, original, appropriated, or transformed.²⁶⁷

A related and slightly more complicated concern involves the likelihood that a fan might sue an author on the grounds that a future work infringes on the fan's own story line. *Anderson v. Stallone* clearly illustrated this possibility.²⁶⁸ In one article, an author describes a case where a fan fiction writer sued the author Marion Zimmer Bradley on the grounds that Bradley appropriated a story line that the fan writer had submitted to a fanzine Bradley owned.²⁶⁹ The fan hired a lawyer and demanded half of the royalties from the forthcoming book.²⁷⁰ Eventually, the book was placed on hold prior to publication, demonstrating the risks that an author may face should she or he read or appropriate works submitted by fans.²⁷¹

The uncertainty over the status of fan fiction presents copyright scholars with an important lesson regarding the development of creativity in cyberspace. While the formal laws of copyright reveal a set of tools for the unapologetic chilling of appropriative expression in cyberspace, many copyright owners tend to engage in a much more dynamic dialogue with their consumers and permit fan fiction to exist so long as it ensures the purity and control of the original creator. At best, the result is the development of two parallel markets that are both non-rivalrous and build upon each other for creativity. The problem is that copyright law, as it is formally structured, enables a hierarchic division between the two that permits the latter to be silenced if the expression proves objectionable or problematic, and here is where slash is so vital, and vulnerable, as a result. Its recoding of largely heterosexual male characters by largely female authors represents a transgression that breaks down both barriers and expectations regarding the "proper" performance of gender and sexuality. And yet its vulnerability within the creative enterprises of cyberspace may mean that its rich narratives can be swiftly silenced as a result of the growing influence of copyright over cyberspace.

266. See Plotz, *supra* note 88 (adding that Lucasfilm has suppressed *Star Wars* slash, but allows uncontroversial fan fiction).

267. See *id.* (explaining that Lucasfilm feared a lawsuit by fans claiming Lucas stole his or her ideas).

268. No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989).

269. See Michela Ecks, *Fan Fiction, Novels, Copyright, and Ethics*, WHOOSH!, Nov. 2001, <http://www.whoosh.org/issue62/ecks2.html> (explaining that the fan fiction writer claimed Bradley used her ideas in her latest *Darkover* novel).

270. See *id.* (adding that the fan fiction writer also wanted to be credited as a co-author).

271. See *id.* (suggesting that authors should allow fan fiction with the condition that they are allowed to use the ideas of fan fiction writers in their own work).

CONCLUSION

Let me close with a quote from a prominent female slash writer who wrote in a helpful essay that “[w]hat I learned from ‘Paris is Burning’²⁷² is that the same person can be a thug and a princess; it all depends on who’s got the ball gown.”²⁷³ The author’s observations belie an important insight: that an audience need not be a set of passive spectators to the world of copyrighted cultural commodities. By re-imagining those narratives, we can actually re-imagine ourselves in the process and, in turn, “slash” the dominant cultural expectations that define audience passivity as a result. Intellectual property can play a key role in this process. It can either enable the codification of hierarchical divisions between producers and creators, as it has done so far, or it can rewrite those narratives and transform the relationships between them into a much greater and more interactive enterprise.

In this paper, I have introduced a necessary conversation between two previously discordant areas of law, intellectual property and gender, through exploring female appropriation of narratives within popular culture. As I have argued, slash fan fiction is but just one example of how greater female audience interactivity can offer us a new world, handing us new lenses with which to view cultural commodities. The themes we have seen within the laws of intellectual property—passive consumers, authorial monopolies, and sovereign products—need no longer dominate our field of vision. Indeed, just as artists have reminded us for centuries, and as slash writers remind us today, another world is certainly possible—it all depends on the power of the audience and the power of participation.

272. *Paris is Burning* is a documentary film about black drag queens in New York City, directed by Jennie Livingston in 1990.

273. Executrix, *The Cost of the Erection: Slash and Gayness*, <http://www.trickster.org/symposium/symp133.html> (last visited July 26, 2006).